83-381

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

METROPOLITAN ENGINEERING COMPANY, INC., a/k/a METROPOLITAN ERECTING COMPANY, INC. - - - - - - **Petitioner**

versus

INRYCO, INC. and AMERICAN FIDELITY FIRE INSURANCE COMPANY - - - - - - - **Respondents**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. MICHAEL POOLE
Attorney at Law
600 Starks Building
Louisville, KY 40202
(502) 587-6838

Attorney for Petitioner, Metropolitan

August 16, 1983

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3281, LOUISVILLE, KY.

QUESTION PRESENTED

Whether the Court of Appeals for the Seventh Circuit erred in affirming the District Court's Order denying Metropolitan relief from a Default Judgment entered as a result of the grossly negligent conduct and misconduct of former counsel of Metropolitan.

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METROPOLITAN ENGINEERING COMPANY, INC., a/k/a METROPOLITAN ERECTING COMPANY, INC. - - - - - - *Petitioner*

v.

INRYCO, INC. and AMERICAN FIDELITY FIRE INSURANCE COMPANY - - - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Metropolitan Engineering Company, Inc., a/k/a Metropolitan Erecting Company, Inc., Debtor in Possession prays for a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Seventh Circuit entered on May 23, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is printed in the Appendix hereto, *infra,* page 13. The Judgment of the United States District Court for the Northern District of Illinois, Eastern Division, is printed in the Appendix hereto, *infra,* page 33, and Orders of the District Court denying post-judgment relief are printed in the Appendix hereto, *infra,* pages 37 and 51.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 23, 1983, and the jurisdiction of the Supreme Court is invoked under 28 USC Section 1254(1).

STATEMENT OF THE CASE

Metropolitan Erecting Company, Inc.,[1] files this Petition for Writ of Certiorari seeking relief from the Opinion and Order of the United States Court of Appeals for the Seventh Circuit affirming the District Court's Judgment of Default and denial of relief from Judgment of Default on the grounds that Metropolitan's former counsel, Mr. Thomas J. Royce, was grossly negligent in his conduct and said conduct should not be charged to Metropolitan.

The Default Judgment by the District Court was entered on December 4, 1981, in the amount of $225,316.93, because of Mr. Royce's failure to answer the Complaint, his failure to comply with the Plaintiff's Discovery Request, and his failure to comply with the District Court's Order regarding Discovery.

Inryco, Inc., filed its Complaint in May, 1980, seeking damages for breach of a subcontract between itself

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[1]Metropolitan Engineering Company, Inc., changed its name to Metropolitan Erecting Company, Inc., in 1979, and filed a Petition for Relief under Chapter 11 of the United States Bankruptcy Code on January 10, 1983. The corporation is currently operating under the provisions of Chapter 11 which was filed in the United States Bankruptcy Court for the Western District of Kentucky at Louisville.

and Metropolitan. The subcontract between Metropolitan and Inryco contained an arbitration clause and on August 27, 1980, the case was stayed pending arbitration. The case remained stayed until May, 1981, when the stay was lifted based on Plaintiff's unopposed allegations that the arbitration was not proceeding satisfactorily.

After the stay was lifted, Inryco reasserted its Discovery Request and when responses were not made by Mr. Royce, counsel for Metropolitan, Inryco sought appropriate relief in the District Court to obtain Discovery. After Mr. Royce failed to comply with said Discovery Request and Orders of the District Court, Default Judgment was entered.

Between the lifting of the stay in May, 1981, and the entry of the Default Judgment in December, 1981, Metropolitan attempted to cooperate with its counsel, Mr. Royce, however, Metropolitan was not aware of all of Inryco's Discovery Requests nor aware that the District Court had entered Orders regarding Discovery. Metropolitan was not informed of the Motion for a Default Judgment or the Judgment itself until late January, 1982, more than a month after it had been entered. (See Affidavits of Joseph P. Dooley, Appendix, page 63 and Mr. Thomas J. Royce, page 55).

Upon learning of the Default Judgment, Metropolitan obtained new counsel and filed a Motion to Vacate the Default Judgment under Rule 60(b) of the Federal Rules of Civil Procedure and attempted to cure Mr. Royce's defaults by filing an Answer to the Amended Complaint, Answers to Plaintiff's Interroga-

tories, Responses to Plaintiff's Request to Produce Documents and offering to produce its Officers for Deposition at the convenience of the Plaintiff.

Metropolitan also filed an Affidavit by Mr. Royce in which he stated that he had inadvertently failed to file his written appearance with the clerk of the District Court, he believed that he was engaged in negotiation with Inryco's counsel regarding the Discovery Request at the time the Judgment was entered and that he had not received notice of the many significant Motions in the case, including Inryco's Motion for Default Judgment. Inryco in response filed the Affidavit of its counsel, Mr. Leonard S. Shifflett, which contradicted Mr. Royce's Affidavit in almost every detail. The District Court ruled on April 13, 1982, that the record was "replete with inexcusable omissions, deceits and irresponsibility" and denied Metropolitan's motion to vacate, at which time Metropolitan had moved for reconsideration of the District Court's Decision. The Motion for Reconsideration was based upon certain factual errors in the District Court's Opinion and upon the theory that the facts set forth in Mr. Shifflett's Affidavit and accepted by the District Court in its Opinion provided an alternative ground for relief under Rule 60(b), namely, that Mr. Royce's grossly negligent conduct justified relief from a Judgment in excess of $225,000.00, where there had been no trial on the merits and where Metropolitan itself did not participate in and was not aware of its counsel's misconduct. The District Court denied Metropolitan's Motion for Reconsideration and upon appeal, the

United States Court of Appeals for the Seventh Circuit affirmed the District Court.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The basis of jurisdiction in the Federal Court of first instance was diversity of citizenship.

REASONS FOR GRANTING WRIT

The Writ of Certiorari should be granted because the Court of Appeals for the Seventh Circuit has decided an important question, namely, the extent to which a party to litigation should be penalized because of the misconduct and gross negligence of its counsel, where that party was not aware of said misconduct or negligence at the time occurred and was not a participant in said negligence or misconduct. Metropolitan respectfully states that it has been unfairly penalized because of the misconduct of its former counsel, Thomas Royce, and that this issue should be settled by the Supreme Court and is a ground for Certiorari.

The facts and history of this litigation are set forth in the Brief filed on behalf of Metropolitan in the United States Court of Appeals for the Seventh Circuit, which is incorporated herein by reference. The United States Court of Appeals for the Seventh Circuit in affirming the District Court's Order, violated the liberal spirit of Rule 60(b) and abused its discretion in declining to vacate a Default Judgment for more than $225,000.00, where Metropolitan acted with reasonable promptness, set forth its meritorious defenses and did not willfully participate in the default.

The Seventh Circuit in its opinion as in many cases where a motion to vacate is denied, suggested that suits for malpractice are the appropriate remedy for the gross neglect of an attorney resulting in the default or dismissal of the party's case. Indeed, in *Link* v. *Wabash R.R. Co.,* 370 U.S. 626 (1962), the Supreme Court said that "if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." (370 U. S. at 634 n. 10). See, also, *Barber* v. *Turberville,* 218 F. 2d 34, 38 (D.C. Cir. 1954) Prettyman, J. dissenting); *Qualgliano* v. *United States,* 293 F. Supp. 670, 672 (S.D. N.Y. 1968). Such relief may not be available to Metropolitan here, however, since Mr. Royce does not carry liability coverage (R. 70, Ex. A), and, while he may be liable for his conduct, there is little likelihood that Metropolitan will recover a $225,000.00, Judgment from an uninsured sole practitioner.

Because there were disputed issues of fact based upon the Affidavits of Mr. Royce and Mr. Shifflett, the District Court should have resolved the disputed issues in favor of the moving party, in consistency with the fundamental goal of the American Judicial Process to insure that disputes are resolved on their merits whenever possible. *Ellingsworth* v. *Chrysler,* 665 F. 2d 180 (Seventh Cir. 1981), *Jackson* v. *Beech,* 636 F. 2d 831 (D.C. Cir. 1980), *Compton* v. *Alton Steamship Company, Inc.,* 608 F. 2d 96 (Fourth Cir. 1979).

Further, there is no dispute that Metropolitan was not aware that Mr. Royce had failed to answer the

Complaint and had failed to comply with Plaintiff's Discovery Requests and the Orders of the District Court. Because of this, it was an error for the Seventh Circuit to affirm the District Court's Orders which resolved the disputed issues of fact regarding Mr. Royce's conduct against Metropolitan and refused to vacate the Default Judgment.

Both the District Court and the Court of Appeals faulted Metropolitan for not following the progress of the case and inquiring of its attorney. This assertion is incorrect based upon the facts in the record in this case.

It is clear that a client has an obligation to monitor its attorney and assure that the attorney is adequately protecting its interest. However, in this case Metropolitan was in contact with Mr. Royce who mislead Metropolitan as to the status of the law suit. Accordingly, while there were many things about the litigation that Metropolitan was not aware of, Metropolitan was aware through its attorney of its status, or thought it was. Metropolitan knew that Mr. Royce had obtained a stay of suit pending arbitration and that the arbitration was proceeding although slowly (See Appendix, page 66). Metropolitan was informed that the stay had been lifted and the compliance with Discovery Requests would be required and Metropolitan had complied in part and indicated its willingness to comply fully with those Discovery Requests (Appendix, page 67). The District Court's and the Seventh Circuit's belief that Metropolitan should have done even more to ascertain the status of the litigation

from Mr. Royce is error not only because it ignores that Metropolitan was aware of the general status of the litigation but it also discounts the practical effect of Metropolitan's efforts. During the pendency of the stay Metropolitan had no reason to ascertain the status of the litigation from Mr. Royce because the case was stayed, and Metropolitan knew that the arbitration process was progressing. After the stay was lifted Metropolitan was not aware of any facts that would or should have caused them to question the status of the litigation. Metropolitan was entitled to rely upon Mr. Royce's representations as to the status of the case and the facts indicate that Metropolitan was aware of no other facts which could have indicated the proceedings in the District Court were other than as reported by Mr. Royce. The facts also clearly show that Mr. Royce failed to advise Metropolitan, and misrepresented the true status of the case to it.

Where the client is unaware of his attorney's misconduct and the true status of the case through no fault of his own, it is err to charge that client with the attorney's conduct.

In *L. P. Steuart, Inc.* v. *Matthews,* 329 F. 2d 234, 235 (D.C. Cir. 1964), the client

> made "numerous inquiries of" his former counsel who "refused to answer such inquiries" and assured appellee "from time to time" that "the case was proceeding and that settlement of it would be made 'soon'." There is no suggestion that there was any foundation for counsel's reassuring statements. In March, 1962, appellee learned, but

> only by personally checking with the Clerk of the District Court, that his case had been dismissed for failure to prosecute. His former counsel then told him "that steps would be taken to reinstate the case" but took no action, and again refused to answer inquiries.

On these facts, the court held that vacating the Default Judgment was proper. Similarly, in *Jackson* v. *Washington Monthly Co.*, 569 F. 2d 119, 122 (D.C. Cir. 1977), it was held that a Rule 60(b)(6) motion to vacate should be granted where:

> it appears that (the) lawyer might not only have been grossly rather than just midly negligent toward his client, but that he might also have misled the client by reassuring him that the litigation was continuing smoothly when it fact it was suffering severely from lack of attention. (Footnote omitted.)

United States v. *Cirami*, 563 F. 2d 26 (2d Cir. 1977), also illustrates that a client should not be bound where his attorney has misrepresented the facts. In that litigation the Second Circuit had upheld an earlier order denying the defendants' Rule 60(b) motion because there was no indication in the record that the defendants had made any effort to determine the status of the litigation. *United States* v. *Cirami*, 535 F. 2d 736, 739 (2nd Cir. 1976). After the Second Circuit's first decision, defendants again made a motion under Rule 60(b)(6), this time alleging that they had made several efforts to determine the status of the litigation and have been assured, through their accountant, that

their attorney had the matter in hand (563 F. 2d at 33-34. The Court held that relief from the Default Judgment would be appropriate under Rule 60(b)(6) since it was alleged that these assurances were false (563 F. 2d at 34):

> It was only after a Judgment in Default had been entered against them that they discovered that their attorney had not, in fact, been representing them.

The misrepresentations made in *L. P. Steuart, Washington Monthly,* and *Cirami* are the same as those made by Mr. Royce to Metropolitan herein. Indeed, the District Court found that Mr. Royce's sworn Affidavit was itself a misrepresentation. Upon the basis of those misrepresentations the Seventh Circuit should have reversed the District Court for failure to vacate the Default Judgment against Metropolitan. It was error for the Seventh Circuit to rule that Metropolitan is bound by Mr. Royce's conduct because Metropolitan failed to take it upon itself to further ascertain the status of the litigation from Mr. Royce. Under the Seventh Circuit's and District Court's ruling in this case, the only way Metropolitan could have protected itself from the Default Judgment entered herein would have been to file separate appearances in Court so that notices of status calls and other proceedings would have been directed to it rather than, or in addition to Mr. Royce, or to have, either itself or through other local counsel, reviewed the Court file on a regular and continuing basis to determine whether

Mr. Royce was performing his function. To hold that a client is required surreptitiously to check up on his attorney in order to avoid the imposition of a Default Judgment or to be entitled to have such a Judgment vacated subverts the attorney-client relationship which is founded upon the trust and confidence that the client must have in his attorney for the judicial system to function properly. See e.g., *Upjohn* v. *United States*, 499 U. S. 383, 389 (1981); 2 Weinstein's Evidence paragraph 503(02).

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

J. MICHAEL POOLE
600 Starks Building
Louisville, KY 40202
(502) 587-6838

Attorney for Petitioner, Metropolitan

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 82-1790 and 82-2166

INRYCO, INC., - - - - - - *Plaintiff-Appellee,*

v.

METROPOLITAN ENGINEERING COMPANY, INC.,

and

AMERICAN FIDELITY FIRE INSURANCE COMPANY, - - - - - - *Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 2245–George N. Leighton, Judge.

OPINION—Argued February 7, 1983;
Decided May 23, 1983

Before BAUER, COFFEY, *Circuit Judges,* and HOLDER, *District Judge.**

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*The Honorable Cale J. Holder, United States District Court for the Southern District of Indiana, is setting by designation.

BAUER, *Circuit Judge.* The district court entered a judgment of default against the defendants in the amount of $225,316.93. The defendants argue that the default judgment should have been vacated pursuant to Federal Rule of Civil Procedure 60(b), and appeal from denial of that motion.

The district court entered its judgment of default on December 4, 1981. On February 10, 1982, the defendants filed their Rule 60(b) motion to vacate entry of default, which the district court denied on April 13, 1982. The defendants within ten days filed a Rule 59(e) motion to alter or amend that ruling. Because the plaintiff raised objections to the propriety of the Rule 59(e) motion, the defendants filed a notice of appeal from the Rule 60(b) judgment while the Rule 59(e) motion was pending. This court stayed proceedings in that appeal pending resolution of the defendants' motion to alter or amend.

The district court on June 18, 1982, denied the motion for reconsideration; a second notice of appeal was filed in this court on July 16, 1982. We affirm.

I. FACTS

The procedural history of this case is lengthy, but a review is needed to understand why the district court entered the default judgment. Most of the events set out below were chronicled in the district court's memorandum order denying the motion to vacate. The defendants dispute some of the facts.

A. Events leading to default judgment.

Plaintiff Inryco, Inc., sued Defendants Metropolitan Engineering Company (MECO) and American Fidelity Fire Insurance Company, MECO's surety, for breach of contract. Inryco had contracted with the University of

Illinois to build a parking garage at that university's Chicago campus. Inryco subcontracted part of the work to MECO. In its complaint, Inryco claimed that MECO breached the subcontract by failing either to complete the work or to pay its vendors, forcing Inryco to hire another subcontractor to finish the job. Inryco also sought performance on the subcontractor bond from American Fidelity.

The defendants were personally served with process and copies of the complaint in May 1980. Shortly thereafter, Inryco filed interrogatories and production requests.

On June 17, 1980, the defendants, through their retained counsel Thomas J. Royce, moved for a stay of the proceedings pending arbitration. Royce, however, did not file an appearance and the defendants did not answer the complaint. The district court set a briefing schedule on the motion to stay.

Inryco was granted leave to file an amended complaint on July 17. The district court ordered the defendants to answer or otherwise plead by August 6. No such pleading was filed.

On August 22, the district court, under 9 U.S.C. § 3 (1947), granted the defendants' motion to stay the proceeding pending arbitration. Neither Royce nor any other person appeared to represent the defendants.

On its own motion, the district court on October 29 set the case for a status hearing on December 12. The defendants were not represented at that status hearing. The court conducted four additional status hearings on January 26, February 27, April 10, and May 8, 1981. The defendants did not appear at any of the hearings.

On May 15, 1981, Inryco filed a motion to lift the stay of proceedings. Although the motion was personally served on Royce at his office, Royce did not appear in court when the motion was called, and did not file any written objec-

tion or response to the motion. The court granted the motion.

Inryco then served Royce with the interrogatories and requests to produce that were filed originally a year before. Additionally, Inryco filed notices of depositions Responses to these pleadings were due by June 15. On June 19, when no responses were forthcoming, Inryco's counsel telephoned Royce to request discovery compliance. Royce promised a quick reply. Nevertheless, the discovery request remained unanswered until July 6, when Inryco's counsel again telephoned Royce. This time, Royce promised satisfaction by July 20, and the parties rescheduled a deposition of James Dooley, president of MECO, for July 28. When Royce did not respond on July 20, Inryco's counsel called Royce to request compliance. Royce said that the defendants refused to comply with the onerous requests. Notably, Royce never filed objections to the discovery requests with the court.

On August 21, Inryco filed a motion for sanctions under Federal Rule of Civil Procedure 37(d). This time, Royce responded immediately, filing a response stating that the defendants would answer all interrogatories by September 25. In court Royce said that his clients would send all requested documents to Royce's office in early September, and that he would have answers by September 28. The district court therefore continued the motion for sanctions to October 9. Not until October 7 did Royce send seven folders of materials to Inryco's counsel. None of the interrogatories was answered. Inryco's counsel immediately telephoned Royce to complain that the materials were insufficient to satisfy the outstanding discovery requests. Royce made no further attempts to comply.

When the motion for sanctions was called on October 9, Inryco's counsel told the court that Royce's responses were inadequate. Royce did not appear. The court ordered the

defendants to comply with all discovery requests within seven days, and set a status hearing for October 30. Inryco's counsel sent a copy of the order to Royce.

Because two weeks passed without response from Royce, Inryco initiated the action which culminates in this appeal. On October 28, Inryco's counsel personally served Royce with a motion for entry of default on the grounds that the defendants had failed to answer or otherwise plead since May 15, 1981. Royce told the lawyer that he was on trial in another matter. The district court continued both motions—for sanctions and for default—to November 6. Despite the substantial threat to the defendants' interests posed by the pending motions, Royce did not appear in court on November 6. The court entered a continuance to November 13, and ordered Inryco to serve Royce with notice and a copy of a proposed judgment order against the defendants before the next motion call.

Inryco's counsel personally served Royce with the pleading on November 11. Royce explained in a telephone conversation with Inryco's counsel on November 13, that Royce was experiencing difficulty in getting documents from his clients. Inryco's counsel indicated that Royce should explain his situation to the court, but Royce did not appear when the motions were called that day. The court entered the default order and set December 4 for proof of damages.

When Inryco appeared on December 4 with affidavits attesting to the damages it had incurred, the court entered judgment against the defendants for $225,316.93. Royce did not appear.

B. Inryco's arguments.

Inryco characterizes the facts above as clearly indicating the defendants' disregard for this litigation, which Inryco argues was inexcusable. Inryco notes that its lawyers repeatedly told Royce about pending pleadings and

the defendants' allegedly insufficient responses, but got virtually nothing in return. For example, in its memorandum in opposition to the defendants' motion to vacate the default judgment, Inryco called the seven folders delivered to it on October 7 "junk."

In addition, Inryco accuses Royce and the defendants of deliberately sabotaging the arbitration proceedings during the stay so that the case would languish perpetually before both tribunals. Inryco alleges that the defendants purposely withheld payment of fees to the arbitrator and misinformed the arbitrator that the arbitration proceedings should be held in abeyance until court actions ended. Also in this regard, Inryco claims that the defendants not only neglected facets of the litigation, but also "engaged in a strategy of delay throughout this case."

C. The defendants' arguments.

The defendants present a materially different characterization of the facts precipitating default. They argue principally that Royce's failures during the eighteen months this case was before the trial court resulted from inadvertence and excusable neglect. They deny any scheme to purposely delay the suit by applying for and receiving a stay in the district court while at the same time undermining arbitration efforts. (The defendants do not contest the fact that they did not pay required fees so that the arbitration could proceed.) Moreover, they claim that Royce missed the court dates because he believed either that they were unnecessary in light of the pending arbitration or that his responses to discovery, notwithstanding their tardiness, mooted the plaintiff's pleadings regarding discovery.

For example, in his affidavit in support of the defendants' motion to vacate the default judgment—in which he admitted knowing of the pending court date—Royce stated that he skipped the October 9, 1981, call on the motion for

sanctions because he thought the "substantial documents" supplied to Inryco settled the issue. Royce characterized his failure to comply fully with discovery requests as "negotiations" concerning discovery. Royce also noted that "[d]espite . . . having failed to file a formal appearance with the Clerk of the Court, [he] was kept apprised of the major actions in the litigation."

Later in his affidavit, Royce swears that after October 9 he was never again contacted by Inryco in any way concerning the case. (Inryco's counsel claims contact was made or attempted at least seven more times.)

The defendants themselves disclaim any knowledge of all discovery requests and court orders. They further note that when they learned of the default judgment they immediately engaged new counsel, who remedied all of Royce's errors and filed the motion to vacate.

II. Rule 60(b)

The defendants first learned of the default judgment against them near the end of January 1982. Within two weeks, the defendants' new counsel filed an answer to Inryco's amended complaint, responses to Inryco's production requests, answers to Inryco's first set of interrogatories, an appearance, a motion to vacate the default judgment and a memorandum in support of that motion, and the papers necessary for Royce to withdraw as counsel.

In their memorandum supporting the motion to vacate, the defendants argued principally grounds under Federal Rule of Civil Procedure 60(b)(1): that the default order was entered as a result of a mistake, inadvertence, surprise, or excusable neglect.[1]

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[1]Rule 60(b) reads in part:

(b) . . . On motion and upon such terms as are just, the court may relieve a party or his legal representative from

(Footnote continued on following page)

A. General application of Rule 60(b).

"The philosophy of modern federal procedure favors trials on the merits, and default judgments should generally be set aside where the moving party acts with reasonable promptness, alleges a meritorious defense to the action and where the default has not been willful." *A. F. Dormeyer Co.* v. *M. J. Sales & Distributing Co.*, 461 F. 2d 40, 43 (7th Cir. 1972) (quoting *Thorpe* v. *Thorpe*, 364 F. 2d 692, 694 (D.C. Cir. 1966)).

These standards are not intended to include challenges to the correctness of the default judgment; a Rule 60(b) motion to vacate should not be treated as a substitute for an appeal. *DeFilippis* v. *United States*, 567 F. 2d 341, 342 (7th Cir. 1977). When a litigant merely challenges the propriety of a default order, arguing that it was erroneous under the circumstances, the district court may deny Rule 60(b) relief. That rule is reserved for extraordinary relief. A litigant therefore must show exceptional circumstances to justify overturning the default judgment. *United States* v. *Forty-Eight Thousand, Five Hundred Ninety-Five Dollars*, No. 82-2062, slip op. at 5 (7th Cir. Apr. 18, 1983); *Planet Corp.* v. *Sullivan*, 702 F. 2d 123, 125 (7th Cir. 1983).

(Footnote continued from preceding page)

a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.

In its efforts to alleviate the tension that occasionally arises among the principles of promoting efficient, effective litigation by demanding that litigants conduct their cases reasonably, favoring disposition of cases by trial on the merits, and according full justice to all parties, a court must take care to order default only when it is appropriate and absolutely necessary, but then, consequently, only vacate its decision under Rule 60(b) when the evidence so requires.

B. Rule 60(b)(1).

The defendants argue that even a slight abuse of discretion by the district court in denying them relief requires us to reverse. That is not the standard. The decision on a Rule 60(b) motion is left to the broad discretion of the trial court. *Planet Corp.* v. *Sullivan*, 702 F. 2d at 125; *United States* v. *An Undetermined Quantity of an Article of Drug Labeled as Benylin Cough Syrup (Parke, Davis)*, 583 F. 2d 942, 946 (7th Cir. 1978). A standard of review even more stringent than the "abuse of discretion" standard would be inconsistent with the substantial discretion vested in the district court. Moreover, the language used in opinions from this circuit indicate that the general standard applies. *United States* v. *Forty-Eight Thousand, Five Hundred Ninety-Five Dollars*, No. 82-2062, slip op. at 5 (7th Cir. Apr. 18, 1983); *Breuer Electric Manufacturing Co.* v. *Toronado Systems of America, Inc.*, 687 F. 2d 182, 187 (7th Cir. 1982); *Ellingsworth* v. *Chrysler*, 665 F. 2d 180, 184 (7th Cir. 1981); *Textile Banking Co.* v. *Rentschler*, 657 F. 2d 844, 850 (7th Cir. 1981); *Park, Davis*, 583 F. 2d at 947; *Ben Sager Chemicals International, Inc.* v. *E. Targosz & Co.*, 560 F. 2d 805, 809 (7th Cir. 1977); *A. F. Dormeyer*, 461 F. 2d at 42. Although this court in 1962 quoted the District of Columbia Circuit stating that a "slight abuse of discretion in refusing to set aside a default judgment is sufficient

to justify a reversal," *Leong* v. *Railroad Transfer Service, Inc.*, 302 F. 2d 555, 557 (7th Cir. 1962), that language long ago disappeared from our opinions.

Additionally, in these circumstances we see little utility in attempting to distinguish between a slight abuse of discretion and an abuse of discretion. Fortunately, such line-drawing is unnecessary, for the district court exercised its discretion properly.

The defendants argue that excusable neglect lead to the default judgment. Virtually all of Royce's miscues, they claim, can be traced to his inadvertent failure to file an appearance. Royce claims that because of that omission he did not receive notices of the numerous status hearings, and did not even learn of his failure to file an appearance until two months after the default judgment was entered. Similarly, the defendants argue that Royce never received notices of court orders or notices of the motions for sanctions and default.

If the situation was as the defendants describe, then the defendants might have a tenable theory for relief under the principles enunciated in *A. F. Dormeyer*, 461 F. 2d at 43. In *A. F. Dormeyer*, the defendant's counsel had prepared an answer which was mailed to the plaintiff, but had neglected to arrange filing the answer with the court. The defendant's lawyer practiced in New York, where such filings were not generally required. The defendant's only mistake was its failure to file the answer. Yet, even though the plaintiff received the answer, it sought and obtained a default judgment against the defendant within three months from the time that the defendant was originally served with summons. The *A. F. Dormeyer* court ruled that the district court erred in denying a motion to vacate the default judgment, holding that failure to file the answer was excusable neglect.

However, the *A. F. Dormeyer* facts hardly parallel those before us. The district court in this case did not base its default judgment merely on Royce's failure to file an appearance. Instead, it found, even construing the evidence in a light most favorable to the defendants, a record "replete with inexcusable omissions, deceits, and irresponsibilities." The court found that Royce never filed an appearance; never paid any filing fees; never answered the original or amended complaints, even after a reminder from Inryco's counsel; never counterclaimed, even after being directed to do so by his client; never responded to interrogatories; failed for months to inform his clients of outstanding discovery requests; misrepresented to Inryco that he was having trouble getting documents from his clients; and failed to appear at five status calls without once attempting to ascertain from the court the current status of the case.

We can find no error in the court's conclusions. It was well within the court's discretion to refuse the Rule 60(b)(1) motion. We agree that Royce's conduct does not constitute excusable neglect. In fact, Royce showed a callous disregard for the procedures in this circuit. Telephone calls, letters, summonses, and other attempts at contact by both Inryco's counsel and the court were disregarded. Royce's inaction forced the court to act directly against the defendants.

Royce's failure to file an appearance does not excuse his mistakes. For example, Royce was served with notices of several hearings and should have attended them—especially the November 13, 1981, hearing on the motions for sanctions and a default judgment—regardless of his perceptions concerning the status of the case.

The defendants argue that affidavits in support of their motion to vacate conflicted in parts with Inryco's affidavits in opposition, and that therefore the motion should have

won when all doubts were resolved in their favor. *See Jackson* v. *Beech*, 636 F. 2d 831 (D.C. Cir. 1980). We disagree. While some of the defendants' claims may have conflicted with Inryco's allegations, other allegations against the defendants remained unrefuted. We will not strain to fill in gaps in the defendants' affidavits. *See United States* v. *Various Firearms*, 523 F. 2d 47, 51 (7th Cir. 1975) (court should not read in additional allegations to create a genuine issue of fact). Additionally, as a general matter, testimony that on its face seems to contradict initial allegations may not actually raise doubts as to the facts. The trial judge must weigh opposing evidence. If the evidence offered will not support a claim for relief even after giving the movant the benefit of all doubts, then the trial judge may deny the motion. The district court committed no error in its ruling here.

C. Rule 60(b)(6).

Following the district court's denial of their Rule 60(b) motion to vacate, the defendants filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). The only cognizable arguments supporting that motion were: (a) the district court, after it found Royce's conduct inexcusable, deceitful, and irresponsible, should have granted the motion to vacate on the authority of Rule 60(b)(6); and (b) the defendants could not be charged with their lawyer's conduct.

The district court's denial of the motion to alter or amend raises several issues. First, is a Rule 59(e) motion proper after denial of a Rule 60(b) motion? If it is, may the defendants raise a Rule 60(b)(6) claim in the motion to alter or amend? Third, once both those hurdles are cleared, may the defendants assert the same grounds to support the Rule 60(b)(6) claim that were urged as support for an earlier Rule 60(b)(1) claim? Fourth, is a law-

yer's gross negligence "[an]other reason justifying relief from the operation of the judgment" under Rule 60(b)(6)?

We conclude that a Rule 59(e) motion is proper to challenge the Rule 60(b) ruling. Additionally, the defendants here can properly argue 60(b)(6) grounds in their motion to alter or amend, even though the same factual circumstances underlay the Rule 60(b)(1) claim. Finally, we reserve the issue whether a lawyer's grossly negligent conduct can constitute grounds to vacate a default judgment, for here the defendants themselves were negligent.

1. A Rule 60(b) motion does not toll the thirty-day time limit of Federal Rule of Appellate Procedure 4(a)(1) for taking an appeal from the underlying judgment. *Browder* v. *Director, Illinois Department of Corrections*, 434 U. S. 257, 263 n.7 (1978); *Ellingsworth* v. *Chrysler*, 665 F. 2d at 183. However, denial of a Rule 60(b) motion is itself an appealable judgment. *Ellingsworth* v. *Chrysler*, 665 F. 2d at 183; Fed. R. Civ. P. 54(a). Therefore, a losing party may challenge that judgment with a motion to alter or amend under Rule 59(e). *See Williams* v. *Bolger*, 633 F. 2d 410, 413 (5th Cir. 1980); *cf. Morgan Guaranty Trust Co.* v. *Third National Bank*, 545 F. 2d 758 (1st Cir. 1976) (Rule 59(e) motion appropriate after order computing interest and costs even though after entry of formal judgment). The Rule 59(e) motion challenges only the Rule 60(b) judgment, not the validity of the underlying judgment. *Daily Mirror, Inc.* v. *New York News, Inc.*, 533 F. 2d 53, 56 (2d Cir.), *cert. denied*, 429 U. S. 862 (1976). An appeal following a ruling on the Rule 59(e) motion also does not bring the underlying judgment up for review.

Such is the status of this case. The defendants filed notices of appeal after both the Rule 60(b) ruling (it was already too late to challenge the default judgment itself) and the Rule 59(e) ruling. Filing the Rule 59(e) motion voided the first notice of appeal. Fed. R. App. P. 4(a)(4);

Williams v. *Bolger*, 633 F. 2d at 413. So we have before us simply the appeal from an adverse ruling on the motion to vacate.

2. Inryco argues, nonetheless, that the defendants' Rule 59(e) motion was an impermissible attempt to advance a new theory for relief which should have been raised in the Rule 60(b) motion to vacate. Inryco contends that because the motion to vacate did not assert grounds for relief under Rule 60(b)(6), that theory is improper in the motion to alter or amend the judgment.

Because default judgments are not favored by modern courts, we should broadly construe subsequent motions for relief from those judgments to encompass whatever grounds are reasonably presented. *Cf. Textile Banking Co.* v. *Rentschler*, 657 F. 2d at 849 (Rule 60(b) motion there, "even under the most generous characterization," did not qualify as a Rule 59(e) motion). The defendants' motion to vacate advanced grounds under Rule 60(b) only in general terms, without specifically citing that rule. The memorandum supporting the motion cited Rule 60(b)(6). Although the defendants actually argued only grounds under Rule 60(b)(1), the appearance of Rule 60(b)(6) in the memorandum indicates at least that the defendants had not abandoned that ground for relief. Our antipathy toward default judgments in general, and our particular awareness of the severity of this judgment, lead us to accept the defendants' claim that the Rule 59(e) motion asked the district court to reconsider Rule 60(b)(6) grounds which were presented in the motion to vacate.[2]

A more difficult issue is whether the defendants can use the same set of circumstances to support claims under both

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[2]We note that the defendants' Rule 60(b)(6) claim should have been presented and argued more positively in the motion to vacate. The failure to press the claim earlier, however, has no bearing on our decision.

Rules 60(b)(1) and 60(b)(6). This circuit has said in dicta that Rules 60(b)(1) and 60(b)(6) are "mutually exclusive so that they both cannot apply to the same alleged factual situation." *Ben Sager Chemicals*, 560 F. 2d at 810 n.3 (quoting *Bershad* v. *McDonough*, 469 F. 2d 1333, 1336 n.3 (7th Cir. 1972)). The *Bershad* court relied on *Transit Casualty Co.* v. *Security Trust Co.*, 441 F. 2d 788, 792 (5th Cir.), *cert. denied*, 404 U. S. 883 (1971). In *Transit Casualty*, the Fifth Circuit indicated that a litigant should not be allowed to circumvent the one-year time limitation for Rule 60(b)(1) claims by asserting grounds cognizable under Rule 60(b)(1) in a Rule 60(b)(6) motion, which may sometimes be filed more than one-year after judgment. *Ben Sager Chemicals, Bershad, and Transit Casualty*, among others, stand for the proposition that Rule 60(b)(6) cannot be the basis for relief when the facts asserted fall within the purview of one of the other five subsections of Rule 60(b). Rule 60(b)(6) may apply only if Rule 60(b)(1) does not apply. Those courts do not forbid use of the same set of factual circumstances to support a Rule 60(b)(6) claim when those facts do not constitute mistake, inadvertence, surprise, excusable neglect, or grounds under Rules 60(b)(2) through (5).

Inryco argues that only Rule 60(b)(1) was available to the defendants because that was the principal basis of their motion to vacate. But the district court specifically ruled that Rule 60(b)(1) did not apply to the facts asserted. Accordingly, when the district court refused to vacate the default judgment without full discussion of Rule 60(b)(6), the defendants quite properly moved for reconsideration. Our conclusion does not undermine the legislative requirement that a motion to vacate be brought within one year of judgment if relief is to be based on a theory of excusable neglect.

3. The basis for the defendant's claim under Rule 60(b)(6) is that their lawyer was grossly negligent. This, they argue, is an extraordinary circumstance warranting relief.

For the purposes of their Rule 60(b)(6) claim, the defendants concede that Royce's conduct was lamentable. The parties do not agree, however, on whether gross negligence constitutes an extraordinary circumstance entitling a movant to Rule 60(b)(6) relief. Courts also do not agree. *Compare L. P. Steuart, Inc.* v. *Matthews*, 329 F. 2d 234, 235 (D.C. Cir.), *cert. denied*, 379 U. S. 824 (1964) ("[C]lause (6) [of Rule 60(b)] is broad enough to permit relief when as in this case personal problems of counsel cause him grossly to neglect a diligent client's case and mislead the client.") *with Schwartz* v. *United States*, 384 F. 2d 833, 835-36 (2d Cir. 1967) ("[I]f the attorney's conduct was substantially below what is reasonable under the circumstances, the client's remedy is a suit for malpractice.").

This issue is more difficult to resolve than it may seem at first glance. On the one hand, courts hesitate to punish a client for its lawyer's gross negligence, especially when that lawyer affirmatively misled the client. On the other, as Justice Harlan noted for the Supreme Court in *Link* v. *Wabash R. R.*, 370 U. S. 626 (1962), if the client freely choses counsel it should be bound to counsel's actions.

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcusable conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have

> "notice of all facts, notice of which can be charged upon the attorney." *Smith* v. *Ayer*, 101 U.S. 320, 326.

Id. at 633-34 (footnote omitted). *See* 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 60.27[2], at 365-69 (2d ed. 1979). Logic and legal authority support both lines of reasoning.

In *Boughner* v. *Secretary of Health, Education & Welfare*, 572 F. 2d 976 (3d Cir. 1978), the Third Circuit affirmed Rule 60(b)(6) relief for "neglect so gross that it [was] inexcusable," stating:

> In reaching our decision that the circumstances here are sufficiently exceptional and extraordinary so as to mandate relief pursuant to Rule 60(b)(6), we are not unmindful of the need for judicial eagerness to expedite cases, to fully utilize the court's time, to reduce overcrowded calendars and to establish finality of judgments. However, these commendable aspirations should never be used to thwart the objectives of the blind goddess.
>
> Furthermore, the entry of summary judgments precluded an adjudication on the merits of the appellants' claims for benefits, thus constituting the "extreme and unexpected hardship" addressed by the Supreme Court [in *United States* v. *Swift*, 286 U. S. 106 (1932)].

Id. at 978-79. *See also Jackson* v. *Washington Monthly Co.*, 569 F. 2d 119, 122-23 (D.C. Cir. 1978) ("Dismissals for misconduct attributable to lawyers and in no wise to their clients invariably penalize the innocent and may let the guilty off scot-free. That curious treatment strikes us as both anomalous and self-defeating." (footnote omitted)).

Just as we did in *Ben Sager Chemicals*, 560 F. 2d at 810-11, we expressly reserve this issue for another day.

The defendants here were not diligent in pursuing this case and therefore would not prevail even if gross negligence qualified as another Rule 60(b) ground for relief, because courts allowing such relief uniformly require a diligent, conscientious client. Affidavits submitted by the defendants showed that they failed to follow the progress of the case and failed to regularly inquire of their lawyer or the court as to the case's current status. The affidavit of Joseph P. Dooley, president of MECO, indicated that after he retained Royce in May 1980, he had virtually no contact with Royce for more than a year. In the twenty months between filing the complaint and the default judgment, the defendants contacted Royce fewer than a half a dozen times, and at no time knew the precise procedural status of the case. Moreover, our thorough review of the record reveals that Royce did not actually mislead the defendants. The district court found that the defendants apparently neither specifically asked Royce how the lawsuit was progressing nor found out for themselves.

The defendants' neglect precludes Rule 60(b)(6) relief.

D. Imputing conduct to defendants

Most courts are understandably hesitant to impute the misdeeds of a lawyer to his client. To do that shifts the focus of a case away from the dispute between the parties and penalizes parties less culpable than the lawyer. Default judgments are not meant for disciplining a member of the bar at the expense of a litigant's day in court. *Jackson* v. *Beech*, 636 F. 2d at 837.

Nevertheless, important factors lead us to affirm the district court's order. First, much of the damage caused by the defendants' negligence and their lawyer's neglect cannot be undone. Inryco has suffered a two-year delay in resolving its dispute. The court especially was victimized. It spent time and money attempting to administer the

lawsuit, only to be frustrated by the defendants' failures to act. Furthermore, the court's efforts indicated that a lesser sanction likely would not have been effective.

The defendants stress that they manifested innocence by quickly curing procedural defaults and moving to vacate as soon as they learned of Royce's mismanagement. This argument is not persuasive: the remedial actions after the judgment of default do not excuse the months of egregious neglect. *See generally Universal Flm Exchanges, Inc.* v. *Lust*, 479 F. 2d 573, 576-77 (4th Cir. 1973) ("[T]he client must pay, at least initially, the penalty of his counsel's neglect." (citing *Link* v. *Wabash R.R.*)).

III. Summary

This appeal challenges only the correctness of the order denying a Rule (60(b) motion to vacate the default judgment. The district court rejected the defendants' characterization of their lawyers conduct as excusable neglect under Rule 60(b)(1). Additionally, the court ruled Rule 60(b)(6) inapplicable. We find no abuse of discretion, and affirm the judgment.

The lawyer Royce's conduct was grossly negligent. He acted with complete disregard for the judicial process. But even if such conduct might otherwise raise Rule 60(b)(6) grounds for relief, the defendants lose this appeal because they, too, were neglectful.

In closing, we want to further assuage fears that our decision somehow protects the lawyer—one of our own profession — at the expense of the client. The District of Columbia Circuit recognized that fear in *Jackson* v. *Washington Monthly Co.*, 569 F. 2d at 123-24, writing:

> Public confidence in the legal system is not enhanced when one component punishes blameless litigants for the misdoings of another component of the system; to

> laymen unfamiliar with the fundamentals of agency law, that can only convey the erroneous impression they lawyers protect other lawyers at the expense of everyone else.

We agree, but note that public impression may not be so unfavorable as the D.C. Circuit fears. The idea that a default judgment may penalize the innocent and let the guilty lawyer go free is tempered by the fairly common knowledge that a viable avenue for relief exists for truly deserving litigants. Just as with other professionals, a remedy for an attorney's professional negligence is a suit for malpractice. *Bury* v. *McIntosh*, 540 F. 2d 835, 836 (5th Cir. 1976); *Universal Film Exchanges, Inc.* v. *Lust*, 479 F. 2d at 577; *Brown* v. *E. W. Bliss Co.*, 72 F. R. D. 198, 200-01 (D. Md. 1976).

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 80 C 2256 Date: Dec. 4, 1981

Title of Cause *Inryco, Inc.*

v.

Metropolitan Engineering Co., et al.

Brief Statement of Motion *Judgment Order*

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent

Reserve space below for notations by minute clerk

Ordered that judgment be entered in favor of Inryco, Inc., and against Metropolitan Engineering Co., Inc., and American Fidelity Fire Insurance Company, jointly and severally, in the amount of $225,316.93.

DRAFT

(s) LEIGHTON, J.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 2256

INRYCO, INC., a Delaware corporation, - - *Plaintiff,*

v.

METROPOLITAN ENGINEERING CO., INC., a Kentucky corporation, and

AMERICAN FIDELITY FIRE INSURANCE COMPANY, a New York corporation, - - - *Defendants.*

Judge George N. Leighton

JUDGMENT ORDER

This cause coming on as a set matter for proof of damages against defendants, Metropolitan Engineering Co., Inc., and American Fidelity Fire Insurance Company, this court having previously entered, on November 13, 1981, an Order of Default against both said defendants confessing the Complaint against them, and the court having been fully advised, this court finds as follows:

1. Defendants having been given proper notice failed to appear at the hearing held on November 13, 1981, at which time an Order of Default was entered against said defendants for failure to comply with Discovery Orders and for failure to answer the Amended Complaint.

2. Defendants failed to appear at this hearing on proof of damages after having been given due and proper notice by the court of this hearing and of the entry of the Order of Default.

3. The Affidavits of John T. Kirkwood, John Strupeck, Robert W. Piper, Carrie A. Durkin and Leonard S. Shiff-

lett, were filed in open court along with Exhibits numbered 1 to 22, inclusive, and were accepted by the court as proof of the facts set forth therein in lieu of the testimony of said Affiants, who were at that time present in open court.

4. The facts set forth in the Affidavits of John T. Kirkwood, John Strupeck and Robert W. Piper prove that plaintiff, Inryco, Inc., has suffered actual damages of $189,531.87.

5. The facts set forth in the Affidavit of Leonard S. Shifflett prove that Inryco, Inc., has expended as and for attorneys' fees and costs in connection with the Motions for Sanctions against said defendants, the sum of $1,986.25, and that it has incurred additional attorneys' fees in this suit of $13,155.00 and additional costs of $159.94.

6. The statutorily provided prejudgment interest (Ill. Rev. Stat. 1979 ch. 74, par. 2), to which Inryco, Inc., is entitled as additional damages is $20,483.87. The facts set forth in the Affidavit of Carrie A. Durkin attest to the calculation of this prejudgment interest amount.

7. The total amount of damages to which Inryco, Inc., is entitled is $225,316.93.

8. The aforementioned proof of facts establish a *prima facie* case entitling Inryco, Inc., to the damages set forth above.

It Is Ordered that judgment be and hereby is entered in favor of Inryco, Inc., and against Metropolitan Engineering Co., Inc., and American Fidelity Fire Insurance Company, jointly and severally, in the amount of $225,316.93.

(s) George N. Leighton
Judge

Entered this 4th day of
December, 1981, at Chicago, Illinois.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 80 C 2256 Date: April 13, 1982

Title of Cause *Inryco, Inc.*

v.

Metropolitan Engineering Co., et al.

Brief Statement of Motion *Rule 60(b) Motion*

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent

Reserve space below for notations by minute clerk

Enter Memorandum
For the reasons expressed in the memorandum, defendants' motion to vacate the entry of default judgment gaainst them is denied.

DRAFT

(s) LEIGHTON, J.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 2256

INRYCO, INC., a Delaware corporation, - - *Plaintiff*,

v.

METROPOLITAN ENGINEERING CO., INC., a Kentucky corporation, and
AMERICAN FIDELITY FIRE INSURANCE COMPANY, a New York corporation, - - - *Defendants.*

Before the Honorable George N. Leighton,
United States District Judge.

MEMORANDUM

This cause is before the court on a Rule 60(b) motion of defendants Metropolitan Engineering Co. (Meco) and American Fidelity Fire Insurance Co. (American Fidelity) to vacate the judgment of default entered by this court on December 4, 1981. Inryco originally brought this action as a suit based on diversity of citizenship for breach of a contract involving the construction of a parking deck at the University of Illinois, Circle Campus in Chicago. The action was filed on May 6, 1980 against Meco, a subcontractor which allegedly breached certain provisions not relevant here, and American Fidelity, Meco's surety. On plaintiff's application, and based upon facts described below, the court entered a default judgment against both defendants on December 4, 1981. For the reasons expressed herein, defendants' motion to vacate the entry of default judgment against them is denied.

A full review of the facts leading up to entry of default is helpful. The record before this court discloses that the defendants were personally served with process and copies of the complaint in May, 1980, and that in June, plaintiff filed interrogatories and production requests. On June 17, 1980, defendants moved for a stay of the proceedings in this court pending arbitration, through their retained counsel, Mr. Thomas J. Royce. Mr. Royce, however, filed no appearance or answer. The court set a briefing schedule on defendants' motion to stay. On July 17, 1980, plaintiff was granted leave to file an amended complaint, and defendants were directed to answer or otherwise plead by August 6, 1980. No answer or other such pleading was filed, and neither the record nor the parties intimate that an extension of time was agreed to. On August 22, 1980, this court granted the defendants' application for stay of the proceedings pending arbitration.

Between August 22, 1980 and May 15, 1981, the time during which proceedings were stayed, the court held five regularly scheduled status calls. Mr. Royce did not appear at any of them, and no one else appeared on behalf of the defendants. Moreover, although the sole reason for stay was because defendants, through Mr. Royce, expressed a desire to arbitrate the dispute, no arbitration in fact ever took place. Plaintiff claims, and defendants do not dispute, that Meco never paid the fees which were prerequisite to the impaneling of arbitrators by the American Arbitration Association. Although Inryco had paid its fees, and although it requested the Association to impanel arbitrators, its request was rejected because of Meco's failure to pay its fees. Accordingly, Inryco moved to lift the stay in May, 1981. In support, Inryco made the following statement:

> Plaintiff (Inryco) is informed and believes that Metropolitan Engineering Co., Inc., has deliberately failed to

> pay its fees so as to prevent the American Arbitration Association from hearing Inryco, Inc.'s claim.

(Plaintiff's Motion to Lift Stay, p. 3) The motion was personally served on Mr. Royce at his office. However, Mr. Royce did not appear in court when the motion was called, nor did he submit any written form of objection or response to the motion. This court granted Inryco's motion to lift the stay on May 15, 1981. Shortly thereafter, during the months of May and June, Inryco's counsel reserved Mr. Royce by way of messenger with interrogatories and requests to produce originally filed in June 1980, and filed notices of depositions. Responses were due by June 15, 1981. On June 19, plaintiff's counsel phoned Mr. Royce to inquire about discovery compliance, and Mr. Royce promised that production would be made shortly. As of July 6, 1981, no discovery responses had been forwarded, and plaintiff's counsel again phoned Mr. Royce, who said he would satisfy the discovery requests by July 20. A deposition was rescheduled by agreement to July 28. On July 27, plaintiff's counsel again phoned Mr. Royce to inquire when responses would be filed, and at that time Mr. Royce informed him that defendants would not comply because the requests were too onerous. However, Mr. Royce filed no objections to the discovery with this court.

On August 21, 1981, plaintiff filed a motion for sanctions pursuant to Rule 37(d), Fed. R. Civ. P. Mr. Royce responded to the motion by stating that the interrogatories would be answered by September 25, 1981. When the motion for sanctions was called in court, Mr. Royce represented that the requested documents would be produced in his office in early September, and that the interrogatories would be answered by September 28. The motion for sanctions was entered and continued to October 9, 1981. Plaintiff's counsel represents that after the hearing, outside the

courtroom, he reminded Mr. Royce that no answer had been filed, and that Mr. Royce said he would file one shortly.

On October 7, seven manila folders were delivered to the offices of plaintiff's counsel, who characterizes them as "junk." (Plaintiff's Mem. in Opp. to Def. Mo. to Vacate, p. 5) Upon receipt, plaintiff's counsel immediately phoned Mr. Royce and informed him that the materials were insufficient to comply with the outstanding discovery requests, and noted that no answers to the interrogatories had been filed. On October 10, the date on which the motion for sanctions had been entered and continued to, plaintiff's counsel appeared before the court and advised it that some documents had been produced, and that interrogatories were outstanding. This court entered an order directing defendants to comply with outstanding discovery requests within 7 days, and set the case for status on October 30. A copy of that order was sent by plaintiff's counsel to Mr. Royce, who made no response. On October 28, 1981 plaintiff's counsel personally served Mr. Royce with a motion for entry of default for failure to answer or otherwise plead since May 15, 1981. Mr. Royce advised counsel that he was on trial in another matter, and the motions for default and sanctions were continued by the court to November 6, 1981.

On November 6, 1981, Mr. Royce failed to appear in court. The court entered and continued the motions to November 13, and instructed plaintiff's counsel to serve Mr. Royce with a copy of a proposed judgment order. On November 13, counsel for plaintiff personally served Mr. Royce with notice and a copy of the proposed judgment order. Prior to the November 13 hearing, plaintiff's counsel received a phone call from Mr. Royce, who asked, "What are you trying to do to me?" Plaintiff's counsel outlined his position with respect to outstanding discovery, and Mr. Royce responded that he was experiencing trouble

in obtaining documents from his client. Plaintiff's counsel replied that the explanation would have to be given to the court.

On November 13, when the motion was called, Mr. Royce did not appear. The default order was entered and the court set December 4, 1981 as the date for proving up damages. On that date, plaintiff appeared with witnesses and affidavits to support its claim of default under the contract and damages incurred. The court accepted the affidavits, and a judgment order setting forth damages in the amount of $225,316.93 was entered. Plaintiff's counsel represents that his calls to Mr. Royce after December 4, 1981 were never returned. The Rule 60(b) motion to vacate entry of default now before the court was filed on February 10, 1982 by new counsel for the defendants, who also filed an answer to the amended complaint, responses to the outstanding production requests and answers to the outstanding interrogatories.

Defendants' version of events leading to entry of default and judgment thereon is somewhat sketchier. By way of a duly executed affidavit, Mr. Royce explains that his failure to file an appearance and pay the filing fee on behalf of defendants in this court was mere inadvertence. He states that his failure to appear at the October 9, 1981 Inryco motion for sanctions was caused by his assumption that the motion was moot because seven manila folders had been delivered; that he believed he had complied and that no further action was required on his part until plaintiff's counsel contacted him; and he characterizes his failure to comply with discovery as negotiations concerning discovery.

Mr. Royce claims that he never received notice of any of the following proceedings: the motion for default judgment, the order entering and continuing the motion to November 13, or the December 4 prove-up for damages.

He further explains that the reason why he never received notice of any of those proceedings is because of his inadvertent failure to file an appearance and filing fee with the Clerk of the Court. Pertinent portions of Mr. Royce's affidavit are quoted:

• • •

> 19. I received notice of the entry of the default judgment by a misdirected letter dated January 13, 1982, sent to American Fidelity Fire Insurance Company with a copy addressed to me at my old law firm. As can be seen from the letter and envelope (attached as exhibits), my suite number was incorrectly stated.
>
> 20. I did not receive notice of the default hearings during November and December of 1981 from plaintiff's counsel. I have searched my office, I have checked with my clerical staff and receptionist, and have found no trace of having received any such notice. I have checked with my former partners when I had an office in a different building and they have not received any notices either.
>
> 21. Had I been informed of the existence of the pending motions for entry of a default judgment, I would have advised my clients and appeared in Court and opposed the entry of the judgment on the basis that I believed that I was in compliance with the Court's Order on discovery and that I believed that MECO had a meritorious defense to the claims made by Inryco.

An affidavit submitted by Joseph P. Dooley, president of Meco, is also illuminating. Pertinent provisions are excerpted:

• • •

> 11. I was informed that Mr. Royce, in fact, moved for a stay of this litigation pending arbitration of the dis-

pute, and that the motion was granted by the Court. Thereafter, it was my belief that the dispute concerning the University of Illinois job was proceeding to arbitration.

• • •

13. On July 8, 1981, I received a letter from Mr. Royce advising for the first time that he had been served with certain discovery requests by the plaintiff and that responses were to be tendered by the 15th of July. (copy of Mr. Royce's letter so stating attached as exhibit)

• • •

16. The next thing I knew concerning this litigation was that a judgment had been entered in Inryco's favor and against MECO. During the week of January 18, in the course of a conversation with the business agent for the Louisville, Kentucky Ironworker's Union Local, I was advised that the Union was concerned about a "big" judgment that had been entered in favor of Inryco and against MECO in Chicago. At that time I told the business agent that I know nothing of any such judgment and indeed I had not.

17. Immediately thereafter I telephoned Mr. Royce to inquire as to the truth of the business agent's allegations and Mr. Royce told me that he knew of no such judgment nor any basis for such judgment, but that he would look into the matter.

18. During the week of January 25, 1982, I was advised by American's agent in Louisville that the company received a letter from Inryco's counsel advising of the entry of a judgment against MECO and American in the amount of $225,316.93.

19. Immediately thereafter I again telephoned Mr. Royce, who advised that judgment had indeed been

> entered against MECO and American in this matter. Mr. Royce claimed that the default judgment must have resulted from the fact that he moved offices during the pendency of this action and that the underlying motions and notices of actions never found their way to his attention. In any event, Mr. Royce promised that he would take the necessary steps to vacate the judgment and reinstate the cause.
>
> • • •
>
> 22. On Monday, January 31, 1982 . . . I retained (other counsel) . . . Mr. Royce was immediately discharged and directed to turn over his entire file . . .

Also instructive is the second affidavit of Mr. Dooley, which states that it was his intention to pursue arbitration of the issues specifically raised by this litigation before the American Arbitration Association, and that he was delayed in doing so because of other arbitration in other disputes between Meco and Inryco. That affidavit also concedes that arbitration never took place, and that Mr. Dooley never sought to contact Mr. Royce while the instant litigation was stayed in this court, because he did not believe it necessary to do so. Finally, the affidavit of Thomas L. Clark, an attorney licensed to practice law in Kentucky, and who represents the interests of American Fidelity on a regular basis, is worth quoting from:

> • • •
>
> 10. That Affiant was advised of the filing of the motion by counsel for Meco and American for a stay of litigation pending arbitration, and that said motion had been sustained and order issued by the Court. Further, upon periodic inquiries, Affiant was advised by counsel for Meco and American, as well as individuals on behalf of Meco, that the arbitration process

had commenced and was proceeding and that there was no activity occurring in the within styled action before the United States District Court.

• • •

12. That neither Affiant nor American was aware or advised of the significant change in circumstances in the proceedings until or about January 13, 1982, at which time counsel for Plaintiff served a demand for judgment upon the offices of American in Woodbury, New York . . .

None of the supporting documents presented by defendants with their motion to vacate the default judgment explain certain discrepancies evident from a review of the facts described above. Even if all doubts are resolved in favor of the moving defendants, sufficient facts remain which require this court to deny defendants' motion to vacate.

In *Jackson* v. *Beech*, 636 F. 2d 831, 836 (D.C. Cir. 1980), the court held that "on a motion for relief from the entry of a default or a default judgment, all doubts are resolved in favor of the party seeking relief." This holding is to be compared with *Federal Dep. Ins. Corp.* v. *Alker*, 234 F. 2d 113, 117 (3rd Cir. 1956), where the court indicated that in a situation like the one here, there exists the power to weigh the evidence and decide disputed issues of fact. The facts that require this court to deny defendants' motions, even taken in the light most favorable to them, are that: Mr. Royce never filed an appearance as counsel of record for the defendants, and never paid the filing fee required by the rules of this court; Mr. Royce never filed an answer to the original or amended complaint, even after a reminder from plaintiff's counsel; Mr. Royce never filed a counterclaim against Inryco for Meco's damages, although he had been directed to do so by Mr. Dooley; Mr. Royce never proceeded with arbitration, although the record admittedly

is not clear as to whether it was his responsibility to do so; Mr. Royce never filed responses to the interrogatories; Mr. Royce did not inform his clients of the outstanding discovery requests until he sent a letter dated July 6 and requested completion by July 15; between November 11 and November 13 Mr. Royce represented to plaintiff's counsel that he was having trouble obtaining documents from his clients, even though Meco had provided him, as best it could, with the documents he requested and even though Meco heard nothing more from Mr. Royce; Mr. Royce did not submit *any* documents to plaintiff's counsel until October 7; Mr. Royce did not appear at five status hearings held in this court while the stay was in effect, nor did he take it upon himself to ascertain the status of this action, even though such matters are of public record; no explanation is given for plaintiff's counsel's assertion that Mr. Royce spoke to him by phone when informed of the motion for default and asked "What are you trying to do to me?" between November 11 and November 13. Moreover, no redeeming explanation is presented which would justify defendants' inactivity and lack of interest in the law suit: that arbitration, sought by Meco, never took place; Meco never paid the filing fees to the American Arbitration Association; and Meco never took it upon itself to ascertain the status of the litigation from Mr. Royce or independently. Finally, it appears from the record that while American Fidelity may have periodically inquired into the status of the litigation, it nevertheless regretably relied on Mr. Royce to represent its interests and present its defenses.

Based on the record before this court, defendants' motion for relief under Rule 60 (b), Fed. R. Civ. P., must be denied. While defendants strenuously argue that the acts and failures to act on the part of Mr. Royce should not be imputed to them, it is nevertheless true that they

are bound, under these circumstances, by his acts and omissions:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney.

Link v. *Wabash R.R. Co.*, 370 U. S. 626, 633-34 (1962). Although defendants argue that the case of *A. F. Dormeyer Co.* v. *M. S. Sales & Distributing Co.*, 461 F. 2d 40 (7th Cir. 1972) should govern here, this court disagrees. In *Dormeyer*, defense counsel failed to file his appearance and answer with the court, although he did serve copies thereof on plaintiff's counsel. A default judgment was entered, and a motion to vacate was made, which the district court denied. On appeal, the Seventh Circuit held that in situations such as those in *Dormeyer*, courts should be reluctant to attribute to the parties the errors of their legal counsel. The facts of the case, however, are so unlike those in *Dormeyer* that the citation is practically irrelevant. The record before this court is replete with inexcusable omissions, deceits, and irresponsibility, Because this court concludes that defendants are bound by the acts and omissions of Mr. Royce, and because it concludes that defendants could and should have been diligent in ensuring that they were indeed being defended, their motion for relief under Rule 60 (b) is denied. Due to the manner in

which this court has disposed of the motion, it does not reach the question whether meritorious defenses exist, nor other issues collateral to those decided here.

So ordered,

(s) George N. Leighton
George N. Leighton
United States District Judge

Dated: Apr. 13 1982

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 80 C 2256 Date: June 18, 1982

Title of Cause *Inryco, Inc.*

v.

Metropolitan Engineering Co., et al.

Brief Statement of Motion *Defendants' Motion for Reconsideration*

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent

Reserve space below for notations by minute clerk

Enter Memorandum
For the reasons stated in the memorandum, the court denies defendants' motion for reconsideration of its April 13 order denying defendants' motion to vacate the default judgment entered against them on Dec. 11, 1981.

DRAFT

(s) LEIGHTON, J.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 2256

INBYCO, INC., a Delaware corporation, - - *Plaintiff*,

v.

METROPOLITAN ENGINEERING CO., INC., a Kentucky corporation, and
AMERICAN FIDELITY FIRE INSURANCE COMPANY, a New York corporation, - - - *Defendants.*

Before the Honorable George N. Leighton,
United States District Judge

MEMORANDUM

On December 11, 1981, this court entered judgment of default against the defendants, Metropolitan Engineering Co., and Fidelity Fire Insurance Company. Thereafter, on April 13, 1982, the defendants' motion for relief from judgment under Rule 60(b), Fed. R. Civ. P., was denied; and within ten days thereafter, defendants moved for reconsideration pursuant to Rule 59(e), Fed. R. Civ. P. That motion is fully briefed; it is now before the court for ruling. The court has carefully considered the grounds set forth in defendants motion, and concludes that it must be denied.

Even if the Rule 59(e) motion is timely, the arguments made are not persuasive. First, this court found that defendants' inactions constituted inexcusable irresponsibility. Nothing has been presented by the defendants in

this motion which would warrant any other characterization of their failure to defend against this lawsuit. Second, this court remains convinced that in light of the circumstances of this case, the inaction of defendants' counsel must be imputed to his clients. At best, the remaining arguments advanced by defendants are repetitive, and serve "no purpose other than to burden the judicial process with a load which neither the court nor the parties should bear." *Continental Casualty Co.* v. *Americal Fidelity and Casualty Co.*, 190 F. Supp. 236, 237 (S.D. Ill. 1959). For these reasons, the court denies defendants' motion for reconsideration of its April 13 order denying defendants' motion to vacate the default judgment entered against them on December 11, 1981.

So ordered,

(s) George N. Leighton
George N. Leighton
United States District Judge

Dated: June 18 1982

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 80 C 2256

INRYCO, INC., a Delaware Corporation, - - *Plaintiff*,

v.

METROPOLITAN ENGINEERING CO., INC., a Kentucky Corporation, and
AMERICAN FIDELITY FIRE INSURANCE COMPANY, a New York Corporation, - - - *Defendants.*

AFFIDAVIT OF THOMAS J. ROYCE

State of Illinois } SS
County of Cook }

Thomas J. Royce, being first duly sworn upon oath, deposes and states as follows:

1. My name is Thomas J. Royce. I am an attorney licensed to practice before the Courts of Illinois and the Federal District Court for the Northern District of Illinois. This affidavit is made in support of a motion to vacate a default judgment entered against defendants in this case on December 4, 1981.

2. When the case at bar was served upon defendants in May of 1980, I was retained by Metropolitan Engineering Co., Inc. ("MECO") to defend this litigation in the Northern District of Illinois. I was also retained to represent the interest of defendant American Fidelity Fire Insurance Co. ("American").

3. My first action with respect to this litigation was to consider a motion to stay pending the outcome of arbitration which had been initiated by MECO against plaintiff concerning the same subject matter as Inryco's suit against MECO in this Court.

4. In connection with this litigation, in late May and early June of 1980, I prepared a Motion to Stay the Proceedings Pending Arbitration, a Notice of Motion, and began working on a Memorandum of Law in support of that motion.

5. On June 13, 1980 I appeared before the Honorable Judge George N. Leighton on my motion to stay the proceedings. At that hearing, the Court granted me permission to file my memorandum of law in support of motion to stay the proceedings, granted plaintiff time to file a responsive memorandum and granted me time to file a reply.

6. My memorandum of law in support of my motion to stay the proceedings was filed on June 17, 1980.

7. Despite the fact that I appeared before the Court on June 13, 1980 in support of my motion to stay the proceedings, it appears that I omitted to file a formal appearance with the Clerk of the Court and tender the required appearance fee. It is my usual procedure to file an appearance and tender the required fee with the first documents filed in any new litigation and I intended that an appearance be filed in June of 1980.

8. I believed that an appearance had been filed, or at least I had no reason to believe that an appearance had not been filed, until I received notification of the entry of default judgment in this case in January of 1982, and did not realize until February 5, 1982 that I had failed to file an appearance.

9. Despite my having failed to file a formal appearance with the Clerk of the Court, I was kept apprised of the

major actions in the litigation. Since the motion to stay the proceedings affected the pending arbitration concerning the University of Illinois job, I learned of the entry of that Order from plaintiff's counsel and from the American Arbitration Association.

10. Similarly, I learned of this Court's Order lifting the stay, because that also affected the arbitration proceedings.

11. Following the lifting of the stay, I was contacted by plaintiff's attorney, Mr. Leonard S. Shifflett, concerning the interrogatories and request for production of documents which he had sent to me, and subsequently deposition notices of the officers of MECO.

12. In the summer and early fall of 1981 I had several conversations with Mr. Shifflett regarding compliance with Inryco's discovery requests. Apparently, however, discovery was not proceeding as expeditiously as Mr. Shifflett desired, and on August 21, 1981, plaintiff made a motion to impose sanctions for the defendants' failure to comply with the request to produce documents and answer interrogatories.

13. I prepared a response to plaintiff's motion in which I indicated that I was engaged in negotiations with plaintiff's counsel for the production of documents and that plaintiff had responded to an offer to produce documents by filing a motion for sanctions. In my answer, I also indicated that I would comply with discovery requests if granted a short extension of time.

14. During this period of time, I contacted Mr. Joseph P. Dooley, MECO's President, and advised him of Inryco's discovery requests. Mr. Dooley forwarded to me seven folders of responsive documents and advised that additional documents were available for inspection at MECO's offices in Louisville. Mr. Dooley also indicated his willingness to appear in Chicago for a deposition in this matter.

15. Following the preparation and filing of my answer to plaintiff's motion for sanctions, I forwarded to plaintiff, on October 2, 1981, the seven manila folders of documents previously provided by Mr. Dooley.

16. Subsequently, a hearing was held before Judge Leighton and Judge Leighton ordered that defendants comply with discovery requests within seven days. I received a copy of that Order and a letter from plaintiff's counsel dated October 9, 1981.

17. Because I had only a week earlier supplied substantial documents to plaintiff, I believed that I had complied with the plaintiff's requests for discovery. At that point, I was waiting for plaintiff to contact me concerning the scheduling of depositions for MECO's officers and to discuss further Inryco's request for answers to interrogatories.

18. I was never again contacted by plaintiff after the October 9, 1971 letter, either by letter or by telephone.

19. I received notice of the entry of the default judgment by a misdirected letter dated January 13, 1982, sent to American Fidelity Fire Insurance Company with a copy addressed to me at my old law firm. As can be seen from the letter and envelope (attached hereto as Exhibit "1"), my suite number was incorrectly stated.

20. I did not receive notice of the default hearings during November and December of 1981 from plaintiff's counsel. I have searched my office, I have checked with my clerical staff and receptionist, and have found no trace of having received any such notice. I have checked with my former partners when I had an office in a different building and they have not received any notices either.

21. Had I been informed of the existence of the pending motions for entry of a default judgment, I would have advised my clients and appeared in Court and opposed the entry of the judgment on the basis that I believed that

I was in compliance with the Court's Order on discovery and that I believed that MECO had a meritorious defense to the claims made by Inryco.

FURTHER AFFIANT SAYETH NOT.

(s) Thomas J. Royce
Thomas J. Royce

SUBSCRIBED and SWORN to
before me this 9th day
of February, 1982.

(s) Peter A. Wood (SEAL)
Notary public

EXHIBIT 1

[LETTERHEAD OF WILSON & McILVAINE]
January 13, 1982

American Fidelity Fire
Insurance Company
100 Crossways Park West
Woodbury, New York 11797

Re: Inryco, Inc. v. Metropolitan Engineering Co., Inc. and American Fidelity Fire Insurance Company, No. 80 C 2256

Gentlemen:

On December 4, 1981, the Honorable George N. Leighton, Judge of the United States District Court for the Northern District of Illinois, entered judgment in behalf of our client, Inryco, Inc. against you and Metropolitan Engineering Co., Inc. The amount of that judgment is $225,316.93. The judgment was duly docketed in the United States District Court on December 9, 1981. We enclose a copy of the judgment order as signed by Judge Leighton for your information.

Notwithstanding the fact that this judgment has been entered for more than 30 days, neither your company nor your attorney, Thomas Royce, has contacted us with respect to making payment of the $225,316.93 plus post judgment interest. We would appreciate receiving payment in full within 7 days of this letter or else our client, Inryco, Inc., will have no choice but to pursue its remedies including notification of the Illinois Department of Insurance that an outstanding judgment against your company remains unpaid. We trust that such steps will not be necessary.

Sincerely,

Wilson & McIlvaine

By Leonard S. Shifflett

LSS/tt

Enc.

cc: Lawrence Bau

Thomas Royce

WILSON & McILVAINE
135 SOUTH LASALLE STREET
CHICAGO, ILLINOIS 60603

Mr. Thomas J. Royce
O'Malley, Royce & Hopkins
30 N. LaSalle Room 2400
Chicago, IL 60602

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 80 C 2256

INRYCO, INC., a Delaware Corporation, - - *Plaintiff*,

v.

METROPOLITAN ENGINEERING CO., INC., a Kentucky Corporation, and

AMERICAN FIDELITY FIRE INSURANCE COMPANY, a New York Corporation, - - - *Defendants*.

AFFIDAVIT OF JOSEPH P. DOOLEY

STATE OF KENTUCKY
COUNTY OF JEFFERSON } ss

JOSEPH P. DOOLEY being first duly sworn, deposes and says:

1. I am the President of Metropolitan Engineering Co., Inc. ("MECO") a defendant in the above-captioned action. I make this Affidavit in support of MECO and American Fidelity Fire Insurance Company's ("American") Motion to Vacate the judgment entered in favor of plaintiff, Inryco, Inc. ("Inryco") entered on December 4, 1981. As the President and chief operating officer of MECO, I am fully familiar with all of the facts and matters stated in this Affidavit, including the relationship between Inryco and MECO, which has existed for the past several years.

2. In approximately 1976 MECO entered into a series of contracts with Inryco for the performance of services

relating to the placement of reinforcing bars in structural concrete and stressing of post-tensioning steel for post-tension concrete work on approximately eight projects in Illinois, Indiana, Michigan and Ohio. On each of these projects Inryco had entered into a contract with either the owner or the general contractor to design and provide a structural concrete system, including Inryco's design for post-tensioning concrete.

3. Between 1976 and 1979 MECO completed its work on six of the eight projects in which it was involved with Inryco and was in the course of performing its work on the remaining two projects, including the project at issue in this litigation, the University of Illinois Circle Campus parking garage.

4. In approximately 1978 a dispute arose between Inryco and MECO concerning two projects then underway, the University of Illinois job and a similar parking garage in Peoria, Illinois. The dispute centered around Inryco's change of the design of its post-tensioning system without prior notice to MECO in the midst of MECO's performance on these two projects. In addition, a further dispute arose as a result of what MECO believes was Inryco's wrongful attempt to induce MECO's Illinois supervisory employees, to leave the employ of MECO and accept employment with Inryco. MECO believed that Inryco intended to wrongfully terminate MECO's subcontract agreements on the remaining two jobs and thereafter give the work to MECO's former employees; thereby unjustly depriving MECO of the benefit of its subcontract agreements with Inryco and ensuing profit on the two remaining projects. In fact, this happened in connection with the Peoria project.

5. During the year 1979 MECO commenced arbitration against Inryco relating to Inryco's termination of MECO's performance on the Peoria project and an award was en-

tered in MECO's favor and against Inryco in the amount of $29,500.00 plus interest, and costs.

6. In the meantime, disputes arose between Inryco and MECO as to Inryco's and MECO's respective performance in connection with the University of Illinois project. In particular, MECO asserted that Inryco was in default of performing certain of its obligations on the project and Inryco in turn asserted that MECO was in default of certain of its obligations on the project. In January of 1979, MECO gave notice to Inryco that it was suspending its performance pending Inryco's curing certain defaults on its part. Inryco in turn served a notice of default on MECO and later served notice of termination of the subcontract agreement pertaining to this project.

7. At the same time as the disputes arose between Inryco and MECO in connection with the Peoria and University of Illinois jobs, Inryco proceeded to refuse to make payments to MECO for contract balances owing and approved and authorized extra orders on projects which MECO had completed for Inryco, in Detroit, Michigan; Dayton, Ohio; and Dresden, Illinois. MECO commenced arbitration against Inryco relating to each of these projects, and indeed recovered a judgment against Inryco in connection with the Dresden project.

8. Although only the University of Illinois job appears to have been placed in issue by Inryco in this action, the Court should be aware that the disputes existing between Inryco and MECO extend beyond this one project.

9. On May 6, 1980 Inryco commenced the instant litigation against MECO and its bonding company, American, in order to recover alleged damages incurred as a result of Inryco's termination of MECO's performance on the University of Illinois project. On May 19, 1980 MECO commenced arbitration proceedings against Inryco to recover

damages for Inryco's wrongful termination of MECO's performance on the University of Illinois project.

10. Upon receipt of the Summons and Complaint in this action I retained Thomas P. Royce, Esq. of Chicago, Illinois to represent MECO's interest in this matter. Mr. Royce was also authorized to appear on behalf of and represent the interests of American. Upon consultation with Mr. Royce, it was decided that MECO's best interest would be served if the disputes between MECO and Inryco concerning the University of Illinois job were resolved, in accordance with MECO's contract right, in arbitration. Mr. Royce thereafter moved for a stay of this litigation pending arbitration.

11. I was informed that Mr. Royce, in fact, moved for a stay of this litigation pending arbitration of the dispute, and that the motion was granted by the Court. Thereafter, it was my belief that the dispute concerning the University of Illinois job was proceeding to arbitration.

12. During the summer of 1981, in July in particular, I was advised by Mr. Royce in a telephone conversation that this Court had lifted its Order staying the litigation pending the arbitration, and, that all outstanding disputes between Inryco and MECO would be resolved in the context of this lawsuit, including the disputes arising out of the Detroit and Dayton, as well as the University of Illinois jobs.

13. On July 8, 1981, I received a letter from Mr. Royce advising for the first time that he had been served with certain discovery requests by the plaintiff and that responses were to be tendered by the 15th of July. A copy of Mr. Royce's letter is attached hereto as Exhibit "1."

14. In response to Mr. Royce's letter I assembled seven file folders of documents pertaining to the University of Illinois job, which I believed were responsive to the information requested by the plaintiff. I also indicated to

Mr. Royce that additional documents existed and that I would make those documents available to the plaintiff at my office in Louisville. Because of the shear quantity of documents and the fact that many of the items are used in the day to day operation of my business (i.e. payroll records, union benefit records) it was not possible to produce the additional documents in Chicago, Illinois. I also indicated to Mr. Royce that I was prepared to come to Chicago, Illinois for a deposition in this matter.

15. Thereafter, I was advised by Mr. Royce that he was in the process of discussing with counsel for plaintiff other matters pertaining to the requested discovery, as well as a date for my deposition and that he would get back to me if there was anything further required.

16. The next thing I knew concerning this litigation was that a judgment had been entered in Inryco's favor and against MECO. During the week of January 18, in the course of a conversation with the business agent for the Louisville, Kentucky Ironworker's Union Local, I was advised that the Union was concerned about a "big" judgment that had been entered in favor of Inryco and against MECO in Chicago. At that time I told the business agent that I knew nothing of any such judgment and indeed I had not.

17. Immediately thereafter I telephoned Mr. Royce to inquire as to the truth of the business agent's allegations and Mr. Royce told me that he knew of no such judgment nor any basis for such judgment, but that he would look into the matter.

18. During the week of January 25, 1982, I was advised by American's agent in Louisville that the company received a letter from Inryco's counsel advising of the entry of a judgment against MECO and American in the amount of $225,316.93.

19. Immediately thereafter I again telephoned Mr. Royce, who advised that judgment had indeed been entered against MECO and American in this matter. Mr. Royce claimed that the default judgment must have resulted from the fact that he moved offices during the pendency of this action and that the underlying motions and notices of motions never found their way to his attention. In any event, Mr. Royce promised that he would take the necessary steps to vacate the judgment and reinstate the cause.

20. During this same week I contacted my Louisville, Kentucky attorneys, Goldberg and Simpson, and requested their advice as to the proper way to proceed and protect MECO and American's interests. My Louisville attorneys immediately suggested that new counsel in Chicago be consulted in order to evaluate the situation and determine how the default judgment came about. On January 29, 1981 my Louisville attorneys contacted Mr. Samuel Goldblatt of the Chicago firm of Rivkin, Leff, Sherman & Radler and requested that he examine the court file and try to determine what had happened.

21. On Friday, January 29, Mr. Goldblatt obtained a copy of this Court's docket and forwarded the same to my Louisville attorneys by express mail. I was advised by my Louisville attorneys that a review of the docket sheet revealed that my prior counsel, Mr. Royce had failed to file formal written responses to the plaintiff's discovery requests, failed to file an answer to the amended complaint, failed to file a written appearance as counsel of record for MECO and American in this matter, and had failed to appear for numerous status conferences and hearings before the Court.

22. On Monday, January 31, 1982, after reviewing the photocopy of this Court's docket for the first time and after consulting again with my Louisville attorneys I retained Mr. Goldblatt and his firm to represent MECO and

American's interests in this matter. Mr. Royce was immediately discharged and directed to turn over his entire file on this matter to Mr. Goldblatt.

23. It was not until Mr. Goldblatt had been retained and had an opportunity to study and obtain copies of this court's file as well as Mr. Royce's file (approximately February 5, 1982) that I became aware of the events leading up to the entry of the default judgment in this matter.

24. In particular, until Mr. Goldblatt was contacted and had an opportunity to review all the relevant materials, I was not aware of the following:

(a) That Mr. Royce had failed to file an appearance as counsel for record in this action;

(b) That Mr. Royce had failed to file an answer to the amended complaint in this action;

(c) That Mr. Royce had failed to file a counterclaim against Inryco for damages arising out of the termination of MECO's agreement with respect to the University of Illinois project as we had previously discussed, or otherwise seek to recover MECO's claim for damages as asserted in its demand for arbitration pertaining to the University of Illinois job;

(d) That Mr. Royce failed to appear for numerous status hearings between October of 1980 and May of 1981;

(e) That Mr. Royce failed to appear and contest plaintiff's motion to lift the stay pending arbitration;

(f) That Mr. Royce failed to file written answers to the plaintiff's interrogatories and responses to the plaintiff's request for production of documents, which I understand are required under local practice;

(g) That Mr. Royce failed to appear at status hearings between the period September of 1981 and December 31, 1981;

(h) That Mr. Royce failed to receive notice and/or if notice was received, contest plaintiff's motion for a default and for judgment in this matter;

(i) That Mr. Royce failed to timely advise me of the entry of the default judgment.

25. I believe that MECO has valid and meritorious defenses to the claims asserted by Inryco in this action as set forth in MECO and American's Answer to the Amended Complaint (which is attached to these motion papers), and that MECO has a meritorious affirmative claim against Inryco for damages incurred by MECO on this job, (*id.*) which damages are similar to the damages suffered by MECO as a result of Inryco's actions on other jobs upon which MECO has already recovered judgment in arbitration.

26. I am, and have been, ready to defend Inryco's claims and comply with any and all outstanding discovery as well as appear in Chicago, Illinois for a deposition in this matter. At my request, my new counsel have prepared the necessary pleadings to respond to and cure all of the outstanding defaults which were the subject of this Court's order of judgment.

(s) Joseph P. Dooley

STATE OF KENTUCKY
COUNTY OF JEFFERSON } ss.

SUBSCRIBED and SWORN to before me this 10th day of February, 1982.

(s) Jennifer Webb
Notary Public

My commission expires: May 23, 1983
[SEAL]

EXHIBIT 1

[LETTERHEAD OF THOMAS J. ROYCE]

July 6, 1981

Mr. Joseph Dooley
Metropolitan Engineering Corporation
P. O. Box 58158
Louisville, KY 40258

Dear Joe,

Please find enclosed copies of Plaintiff's first request for production of documents and copies of interrogatories.

I would greatly appreciate it if you can have the answered in document procedure no later than the 15th of this month.

Thank you for your cooperation.

Sincerely yours,

(s) Thomas J. Royce

ck

Enclosure

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 2256

INRYCO, INC., a Delaware corporation, - - *Plaintiff,*

v.

METROPOLITAN ENGINEERING CO., INC., a Kentucky corporation, and
AMERICAN FIDELITY FIRE INSURANCE COMPANY, a New York corporation, - - - *Defendants.*

AFFIDAVIT OF LEONARD S. SHIFFLETT

Leonard S. Shifflett, having first been duly sworn on oath, deposes and states that:

1. He is an attorney licensed to practice law in the State of Illinois and is admitted to practice law before the United States District Court for the Northern District of Illinois.

2. He has personal knowledge of the matters set forth in this Affidavit and, if called as a witness in this matter, could competently testify to those facts.

3. He is a partner in the law firm of Wilson & McIlvaine, attorneys for plaintiff Inryco, Inc., (hereinafter "Inryco").

4. After Inryco commenced this action against Metropolitan Engineering Co., Inc., (hereinafter "MECO"), and American Fidelity Fire Insurance Company (hereinafter "American"), the defendants filed a Motion to Stay Proceedings pending completion of arbitration of some of Inryco's claims. After defendants motion was fully briefed,

and after plaintiff amended its complaint, the court stayed the proceedings pending arbitration. Mr. Royce appeared at scheduled court hearings in this matter up until the time that that stay order was entered.

5. During the period that the court stayed proceedings in this action, the court held regularly scheduled status hearings. Those status hearings were held on December 12, 1980, January 16, 1981, February 27, 1981, April 10, 1981 and May 8, 1981. Mr. Royce did not appear at any of those status hearings. Pl. Ex. 1 and 2.

6. On or about May 13, 1981 he caused Inryco's Motion to Vacate the Stay to be personally served on Mr. Royce at his offices at 30 North LaSalle Street. Pl. Ex. 3. In that Motion, he set forth in affidavit form the detailed failure and refusal of the defendants to bring the arbitration matters to a hearing. In particular, he disclosed that the defendants refused to pay the fees required by the American Arbitration Association before it would appoint arbitrators and schedule hearings.

7. Inryco's Motion to Vacate the Stay was heard on May 15, 1981. Mr. Royce did not appear at that hearing.

8. After the order lifting the stay was entered by the court, Mr. Royce never contested the court's order or disputed the order with counsel for Inryco; nor did he call Mr. Shifflett and express surprise or state that he did not have knowledge of the May 15, 1981 hearing.

9. After the court lifted the stay, he again personally served Mr. Royce with Inryco's request for production of documents and interrogatories with a letter dated May 15, 1981. Pl. Ex. 4. He also served Mr. Royce with notice of Joseph Dooley's deposition to be July 8, 1981 with a letter to Mr. Royce dated May 27, 1981. Pl. Ex. 5. Defendant's MECO's response to Inryco's discovery request were due prior to June 15, 1981.

10. By June 19, 1981, he had not received any response to the requested discovery nor had he been contacted by Mr. Royce or anyone else for defendant.

11. On or about June 19, 1981, he telephoned Mr. Royce about MECO's failure to comply with the discovery requests. In the course of that conversation, Mr. Royce said that the documents were coming from Mr. Dooley in Kentucky and that he would have them shortly. Mr. Royce also indicated that he would be filing MECO's answers to the interrogatories shortly. Pl. Ex. 6.

12. On July 6, 1981, two days before the scheduled deposition of Mr. Joseph Dooley, the President of MECO, Mr. Shifflett had not received any of the documents requested in the document request and he had not received any answers to interrogatories nor had he been contacted by Mr. Royce since the telephone conversation of June 19, 1981.

13. On or about July 6, 1981, he called Mr. Royce again about the failure of Mr. Royce's client to comply with the discovery requests. In the course of that conversation, Mr. Royce said that he would produce the documents before July 20, 1981 and that he would have answers to interrogatories by that date. Mr. Shifflett insisted that he be given these documents and the answers to interrogatories before the discovery deposition of Mr. Dooley. Mr. Shifflett agreed to continue the deposition of Mr. Dooley to July 28, 1981. This second agreed extension was set forth in a letter from Mr. Shifflett to Mr. Royce dated July 6, 1981. Pl. Ex. 7.

14. However, on July 20, 1981, Mr. Shifflett had not received any documents from MECO nor had he received answers to interrogatories nor had he been contacted by Mr. Royce.

15. On July 27, 1981, Mr. Shifflett again telephoned Mr. Royce about the failure to provide the requested dis-

covery. In that conversation, he was told by Mr. Royce that MECO now objected to answering the interrogatories and to producing the documents as these requests were too onerous. When asked for more details by Mr. Shifflett, Mr. Royce said he ddin't have any more details from Mr. Dooley that more would be forthcoming.

16. Mr. Royce never filed an objection to the requested discovery either prior to the conversation of July 27, 1981 or after July 27, 1981.

17. When the requested discovery was not forthcoming and no objections were filed, Mr. Shifflett advised his client to file a motion for sanctions pursuant to Rule 37(d). Such a motion was filed and served on Mr. Royce by mail to his office at 30 North LaSalle Street, Chicago, Illinois. Pl. Ex. 8. Mr. Royce apparently received this motion and notice of motion because he filed an answer.

18. Mr. Royce stated in his answer to the Motion for Sanctions that the defendant would answer the interrogatories by September 25, 1981.

19. Inryco's Motion for Sanctions pursuant to Rule 37(d) was heard on August 21, 1981. Mr. Royce attended that hearing. Mr. Royce advised the court that he would produce the documents requested in early September and that he would answer the interrogatories by September 28, 1981. Mr. Royce's representations to the court were incorporated in an order of the court dated August 21, 1981. Pl. Ex. 9. Inryco's Motion for Sanctions was entered and continued to October 9, 1981. This discovery order was also noted in a letter from Mr. Shifflett to Mr. Royce dated August 21, 1981 which was delivered to Mr. Royce by messenger. Pl. Ex. 10.

20. When Mr. Shifflett and Mr. Royce left the courtroom on August 21, 1981, they had a conversation in the hall outside. In that conversation, Mr. Shifflett reminded Mr. Royce that he had not yet filed an answer to the

amended complaint. Mr. Royce responded as they were walking to the elevator that he would file an answer shortly.

21. By September 28, 1981, Mr. Royce had not produced any documents nor had any answers to interrogatories been served on plaintiff's counsel or filed with the court, and no answer had been filed by defendants.

22. On or about October 7, 1981, seven manila folders of photocopied material were delivered to Mr. Shifflett. These folders contained photocopies of material from the job file on the underlying project. The material presented did not comply with the discovery request because it did not contain information relating to the matters in issue.

23. On either October 7 or October 8, 1981, Mr. Shifflett telephoned Mr. Royce and advised him that the material received on or about October 7 in the manila folders did not complete the discovery requested. He particularly emphasised the need to obtain the answers to interrogatories and the documents which were clearly discernable from the request for production of documents. In that conversation, Mr. Shifflett said that he would advise the court on October 9 that Mr. Royce had not complied with the discovery ordered by the court.

24. On October 9, 1981, Mr. Shifflett appeared in connection with Inryco's Motion for Sanctions. He advised the court that he had received some of the materials but that no answers to interrogatories had been filed. The court continued the motion and ordered defendant to comply with the requested discovery within seven days. The matter was set down for further hearing on October 30, 1981.

25. On October 9, 1981, Ms. Carrie A. Durkin, an associate with Wilson & McIlvaine prepared an minute order as requested by Judge Leighton and sent it to Mr. Royce with a cover letter. Pl. Ex. 11.

26. Notwithstanding the additional seven day extension, no further documents or answers to interrogatories came from Mr. Royce.

27. On October 28, 1981, Mr. Shifflett caused Mr. Royce to be personally served with a motion for an order of default for failure to answer or otherwise plead to the complaint since May 15, 1981. Pl. Ex. 12. On October 30, 1981, that motion was continued along with plaintiff's Motion for Sanctions to November 6, 1981. Mr. Royce did not appear at the court hearing on October 30, 1981 because prior to October 30, 1981 he telephoned Mr. Shifflett and said that he was on trial in another matter. Judge Leighton continued both Motions until November 6, 1981. Pl. Ex. 13.

28. On November 6, 1981, Mr. Royce again failed to appear in court and Judge Leighton continued the matter to November 13, 1981 and instructed Mr. Shifflett to serve on Mr. Royce a copy of a proposed judgment order. Pl. Ex. 14.

29. On November 11, 1981, Mr. Shifflett caused Mr. Royce to be personally served with a notice that on November 13, 1981, Inryco would submit an order of default to Judge Leighton in the form attached to that notice. Pl. Ex. 15. Thus, Mr. Royce was personally served with both the notice of the hearing on November 13, 1981 and the proposed judgment order.

30. Prior to the hearing on November 13, 1981, Mr. Shifflett received a telephone call from Mr. Royce wherein Mr. Royce stated, "What are you trying to do to me?" Mr. Shifflett responded to Mr. Royce that he had failed to keep any of the agreed discovery dates, that he had not filed an answer as he said he would more than two months ago and that therefore plaintiff was left with no alternative but to take this action. Mr. Royce responded that he was having difficulty getting documents from his client. Mr. Shifflett responded to Mr. Royce, "I'm sorry, but you are going to

have to come over on the Motion and explain it to the Judge." Mr. Shifflett related this conversation with Mr. Royce to his partner, Mr. John Lien, who appeared before Judge Leighton on November 13 in connection with the judgment order as Mr. Shifflett had another court appearance that morning.

31. On November 13, 1981, Mr. Lien appeared in court and presented the court requested judgment order. Mr. Royce did not appear. The order as served on Mr. Royce was entered. Pl. Ex. 16. The prove up date of December 4, 1981 was set by the court.

32. On December 4, 1981, Mr. Shifflett appeared in court with witnesses and affidavits to prove both the default under the contract and the damages. The affidavits of the witnesses were accepted by the court as evidence and Mr. Shifflett was instructed to prepare a judgment order in accordance with the affidavits.

33. On December 4, 1981, Mr. Shifflett submitted to the court the judgment order which was then entered. Pl. Ex. 17.

34. After December 4, 1981, and prior to December 31, 1981, Mr. Shifflett telephoned Mr. Royce's office on at least two occasions. At both times, Mr. Shifflett was told that Mr. Royce was out of the office. Mr. Shifflett left his name and telephone number. Mr. Royce never returned those calls.

35. On at least two occasions between January 1 and January 13, 1982, Mr. Shifflett telephoned Mr. Royce's office and was told that Mr. Royce was either in conference or not in the office. He left his name and number and a message that he was calling about the default judgment in the Inryco case. Mr. Royce did not return any of those calls.

36. On January 13, 1982, he sent a letter to American Fidelity Insurance Company's home offiice in Woodbury,

New York and a copy of the letter was sent to Mr. Royce. This letter was a second letter demanding payment of the default judgment. Although, according to Mr. Royce's affidavit, he received this letter, at no time did he contact Mr. Shifflett concerning the default judgment.

37. The first contact he received from anyone representing the defendants regarding the default judgment came from Mr. Samuel Goldblatt, one of the new attorneys for defendants, on or about February 9, 1982.

(s) Leonard S. Shifflett
Leonard S. Shifflett

Subscribed and sworn to before me
this 26th day of February, 1982.

(s) Jean Randazzo
Notary Public

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 2256

INRYCO, INC., a Delaware corporation, - - *Plaintiff,*

v.

METROPOLITAN ENGINEERING CO., INC., a Kentucky corporation, and
AMERICAN FIDELITY FIRE INSURANCE COMPANY, a New York corporation, - - - *Defendants.*

State of Kentucky }
County of Jefferson } ss

Judge Leighton

AFFIDAVIT OF JOSEPH P. DOOLEY

JOSEPH P. DOOLEY being first duly sworn upon oath, deposes and states as follows:

1. I am the president of Metropolitan Engineering Company, Inc. ("MECO") a defendant in the above-captioned action. I make this Affidavit in support of MECO and American Fidelity Fire Insurance Company ("American") motion to vacate the judgment entered in favor of plaintiff, Inryco, Inc. ("Inryco") entered on December 4, 1981. As the president and chief operating officer of MECO, I am fully familiar with all of the facts and matters stated in this Affidavit, and am authorized to make it on behalf of MECO.

2. Although I believed that MECO's interests would be better protected by arbitration of the issues raised by

this suit as provided in the contract between MECO and Inryco, MECO never, at any time, adopted a plan or strategy to delay or avoid litigation of the issues raised by the complaint in this suit.

3. During the period that the case was stayed pending arbitration, MECO was actively engaged in arbitration and in the enforcement of arbitration decisions involving other jobs that MECO had with Inryco.

4. It was my intention to pursue the arbitration of the issues raised specifically in this litigation before the American Arbitration Association at the conclusion of those ancillary proceedings.

5. I did not contact Mr. Royce during the period that the suit was stayed since I did not believe that it was necessary to do so in light of the order prohibiting further action in the litigation pending arbitration of the issues involved.

6. Following the lifting of the stay I collected and delivered MECO's documents to Mr. Royce in September, 1981, and I was informed by Mr. Royce that he was negotiating with plaintiff's counsel for further discovery.

7. I had not contacted Mr. Royce before learning of the default judgment because in my experience with other litgation, much of it in other jurisdictions, substantial periods of time often pass between responses to discovery requests. However, I had intended to call Mr. Royce later

in January to begin to develop the documents and materials necessary to assert MECO's claims against Inryco.

Further Affiant Sayeth Not.

(s) Joseph P. Dooley
Joseph P. Dooley

Subscribed And Sworn To
before me this 4th day
of March, 1982.

(s) Jeanne J. Bush
Notary Public
Kentucky State-at-large
My commission expires: 6/22/85

No. 83-381

In the

Supreme Court of the United States

OCTOBER TERM, 1983

METROPOLITAN ENGINEERING COMPANY, INC., a/k/a METROPOLITAN ERECTING COMPANY, INC.,

Petitioner,

vs.

INRYCO, INC. and AMERICAN FIDELITY FIRE INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LEONARD S. SHIFFLETT
Suite 2300
135 South LaSalle Street
Chicago, Illinois 60603
(312) 263-1212

Of Counsel
WILSON & MCILVAINE
Suite 2300
135 South LaSalle Street
Chicago, Illinois 60603

LAWRENCE BAU
2558 West 16th Street
Chicago, Illinois 60608

Attorneys for Respondent Inryco, Inc.

CHAS. P. YOUNG CHICAGO, INC.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF CASE

Respondent, Inryco, Inc. ("Inryco"),[1] submits the following statement of the case in order to correct omissions and inaccuracies in the statement of the case submitted by Petitioner, Metropolitan Engineering Company, Inc. ("Metropolitan"). The United States Court of Appeals for the Seventh Circuit affirmed the District Court's Orders denying relief under Rules 60(b) and 59(e) from a default judgment entered because of defendants' failure to comply with plaintiff's

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[1] Pursuant to Rule 28.1 of this Court, Inryco states that it is a wholly-owned subsidiary of Inland Steel Company. Inryco has no subsidiaries other than one wholly-owned subsidiary. Inryco owns no interest in any other affiliated company.

discovery requests and the District Court's Order compelling discovery, and for failure to answer the complaint.

Inryco commenced this action in May, 1980, seeking money damages for Metropolitan's breach of its subcontract with Inryco and on American Fidelity Fire Insurance Company's ("American") completion bond. Discovery requests were duly served by Inryco, but on August 27, 1980, this action was stayed on motion of Metropolitan pending arbitration of the claim. In May, 1981, Inryco sought an order lifting the stay because the defendants had not proceeded with arbitration. Defendants did not oppose that motion. Shortly after the stay was lifted on May 15, 1981, plaintiff re-served its discovery requests. Defendants made no response to the discovery requests, even though Inryco's attorneys contacted defendant's attorney, Mr. Thomas Royce, several times and received assurances that responses would be forthcoming. On August 21, 1981, Inryco filed a motion for sanctions pursuant to Rule 37(d) of the Federal Rules of Civil Procedure based upon defendant's failure to comply with discovery requests. Mr. Royce, attorney for defendants, appeared in opposition to the motion and represented to the Court that Inryco's interrogatories would be answered by September 28, 1981. Inryco's motion for sanctions was continued. Documents were not produced and interrogatories were not answered by September 28, 1981. Thereafter Inryco's continued motion for sanctions was heard by the Court no fewer than four times, even though the Court had, on the first hearing, ordered discovery to be completed by September 28. *See* Petitioner's Appendix at 40-42.

On November 13, 1981, after defendants' attorney had been served with a copy of a proposed judgment order, the Court entered an order of default against the defendants and the matter was set down for December 4, 1981 for a hearing on proof of damages. On December 4, 1981, the Court accepted the affidavits of Inryco's witnesses, who were present in open court, and a judgment order setting forth damages in favor of Inryco was entered. *See* Petitioner's Appendix at 43.

On February 10, 1982, the defendants filed a motion to vacate entry of the default order pursuant to Rule 60(b). That motion was supported by the affidavits of Mr. Royce, attorney for defendants, and Mr. James Dooley, president of Metropolitan, and subsequently by the affidavit of Mr. Clark on behalf of American. Judge Leighton issued his Memorandum Opinion dated April 13, 1982, denying the Rule 60(b) motion, and in that Memorandum Opinion he meticulously reviewed the procedural facts leading up to the entry of the default order. The Court, in its Memorandum Opinion, said that:

> The record before this court is replete with inexcusable omissions, deceits and irresponsibility. Because this court concludes that the defendants are bound by the acts and omissions of Mr. Royce, and because it concludes that the defendants could and should have been diligent in ensuring that they were indeed being defended, their motion for relief under Rule 60(b) is denied.

Petitioner's Appendix at 49. The record before the Court in the form of Mr. Dooley's affidavit specifically disclosed that Mr. Royce had contacted him concerning Inryco's discovery requests and that he knew that discovery was to be completed by July 15, 1981. Petitioner's Appendix at 66, ¶ 13. Although armed with this knowledge, he did not send documents to his attorney until September 1981, and he never provided responses to Inryco's interrogatories. The affidavit of Mr. Clark led Judge Leighton to conclude that American had turned the matter completely over to Mr. Royce and did not make significant inquiries as to the matter. *See* Petitioner's Appendix at 48.

Within ten days of the entry of the Order denying the Rule 60(b) Motion, defendants filed a Rule 59(e) Motion, in which they asserted that indeed their attorney was grossly negligent and, therefore, they should not be bound by his actions. Mr. Dooley submitted an additional affidavit in support of the Rule 59(e) Motion. *See* Petitioner's Appendix

at 80-82. Among other things, this affidavit disclosed that Mr. Dooley did not proceed with arbitration proceedings in this matter even though this action was stayed in August, 1980 at his request and for that purpose. In his second affidavit, submitted one and a half years after the stay was granted, Mr. Dooley stated that it had been his "intention to pursue the arbitration" at the conclusion of some other ill-defined litigation. Petitioner's Appendix at 81, ¶ 4. He also acknowledged that he did not contact Mr. Royce during the period that the suit was stayed, and that after he had been contacted by Mr. Royce in July, 1981, he "intended to call Mr. Royce later in January" [1982]. Petitioner's Appendix at 81–82, ¶ 7. On July 18, 1982, after its review of these additional matters submitted by defendants, the District Court reaffirmed its denial of the motion to vacate. The United States Court of Appeals for the Seventh Circuit affirmed this decision of the District Court on May 23, 1983.[2] American paid Inryco the amount of the judgment and filed an executed Satisfaction and Assignment of Judgment in the District Court on August 5, 1983.

SUMMARY OF ARGUMENT

Metropolitan's petition for a writ of certiorari should be denied. The question presented for review by Metropolitan was expressly and properly reserved by the Court of Appeals and should not be decided by this Court. Metropolitan has not identified any important question for review, nor has it demonstrated that the decisions of the courts below conflict with decisions of other United States Courts of Appeals. Metropolitan has attempted to re-cast the facts found by the courts below into facts more favorable to it, but it has not identified a single finding which is clearly erroneous. For all of these reasons, the petition should be denied.

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[2]The opinion of the Court of Appeals has been published as *Inryco, Inc.* v. *Metropolitan Engineering Co., Inc.*, 708 F.2d 1225 (7th Cir. 1983).

ARGUMENT

Petitioner Metropolitan has failed to demonstrate any reason for this Court to grant a writ of certiorari, including those bases set forth in Rule 17.1 of the United States Supreme Court. Therefore, the petition should be denied.

The question presented to and decided by the Court of Appeals was whether the District Court abused its discretion in this case when it declined to vacate a default judgment after finding that both defendants' counsel and the defendants themselves had been at fault in the events leading to the entry of the default order.

Contrary to Metropolitan's contention, the Court of Appeals did not decide an important question which should now be decided by this Court. The Court of Appeals expressly reserved the question which Metropolitan now seeks to have this Court decide, i.e., "whether a lawyer's grossly negligent conduct can constitute grounds to vacate a default order."[3] This question was properly reserved because both the Court of Appeals and the District Court found that Metropolitan and American were themselves neglectful in the events leading to the entry of the default order. *Id.*; District Court Opinion, Petitioner's Appendix at 53–54. Whether or not the gross negligence of counsel constitutes a proper ground for relief under Rule 60(b)(6),[4] the circumstances presented on the record below precluded such relief. Thus, the question posited as the important question for review at page 5 of Metropolitan's petition simply was not decided by the Court of Appeals in this case and should not, therefore, be submitted to this Court.

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[3] The court of appeals stated: "Finally, we reserve the issue whether a lawyer's grossly negligent conduct can constitute grounds to vacate a default judgment, for here the defendants themselves were negligent." 708 F.2d at 1232, Petitioner's Appendix at 25.

[4] Inryco continues to maintain that gross negligence of counsel is not a proper ground for relief under F. R. Civ. P. 60(b)(6).

Metropolitan's arguments essentially reduce to its assertion that the courts below made a factual error in finding that Metropolitan and American were themselves negligent in failing to attend to the litigation. Nevertheless, Metropolitan has not succeeded in identifying a single factual finding which is clearly erroneous. The District Court reviewed the facts in its first Memorandum Opinion when it passed on the request for relief under Rule 60(b). The Court made extensive findings of facts and quoted liberally from the affidavits submitted to it. *See* District Court Opinion, Petitioner's Appendix at 40-48. On the basis of the material submitted to it and after resolving all doubts in favor of Metropolitan and American, *see id.*, Petitioner's Appendix at 47, the District Court found that Metropolitan and American should have been, but were not, diligent in ensuring that they were indeed being defended. Petitioner's Appendix at 49. The Court of Appeals correctly found that the District Court committed no error in its resolution of the factual questions presented to it. *See* 708 F.2d at 1231, 1235, Petitioner's Appendix at 24, 31.

There are no conflicts in the federal courts over the principle involved in this case, namely, that a litigant who has participated in the events leading to the default judgment is not entitled to relief. *See, e.g., Dominquez* v. *United States*, 583 F.2d 615 (2d Cir. 1978) (per curiam), *cert. denied*, 439 U. S. 1117 (1979); *Ben Sager Chemicals International, Inc.* v. *E. Targosz & Co.*, 560 F.2d 805 (7th Cir. 1977); *Cliff* v. *PPX Publishing Co.*, 84 F.R.D. 369 (S.D.N.Y. 1979); *United States* v. *Payne*, 272 F. Supp. 939 (D. Conn. 1967). Metropolitan fails to demonstrate how this conclusion by the Court of Appeals is erroneous. Metropolitan's assertions that it had no reason to follow the litigation because it was entitled to rely on its attorney are misleading and fail to reflect the facts in this case. As disclosed by the affidavits of Mr. Royce and Mr. Dooley, Metropolitan was an active participant in failing to proceed with arbitration and had knowledge concerning the discovery deadlines, yet failed to respond within the time permitted under the rules. Whatever principles may apply

to the truly innocent litigant, they do not apply to Metropolitan under the facts in this case.

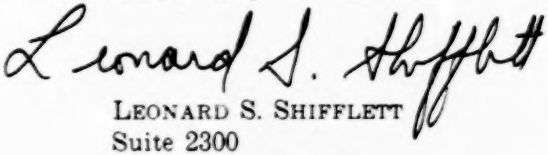
Similarly, Metropolitan cannot rely on unsupported assertions that it was "misled" by its attorney. The affidavits of James Dooley, Metropolitan's president, do not disclose a single instance of Metropolitan's being misled by its attorney.

Metropolitan has not presented specific allegations of factual error. This Court has indicated that it will not reexamine the record when the two courts below have, as they did in this case, agreed on the facts. *See Boehmer* v. *Pennsylvania Railroad Co.*, 252 U. S. 496, 498 (1920). Metropolitan has not presented any question which should be decided by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



LEONARD S. SHIFFLETT
Suite 2300
135 South LaSalle Street
Chicago, Illinois 60603
(312) 263-1212

Of Counsel
WILSON & MCILVAINE
Suite 2300
135 South LaSalle Street
Chicago, Illinois 60603

LAWRENCE BAU
2558 West 16th Street
Chicago, Illinois 60608

Attorneys for Respondent
Inryco, Inc.